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In the Supreme Court

OF THE

United States

October Term, 1986

KAISER CEMENT & GYPSUM CORPORATION,
Petitioner,

v.

FISCHBACH & MOORE, INC.
AND THE HOWARD P. FOLEY CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in an antitrust case involving bid-rigging allegations, a District Court can properly use the concept of "fair market value" — as distinguished from "competitive price" — as the standard of measuring antitrust damages in ruling, on motion for summary judgment, that even if the bid-rigging conspiracy allegations are taken as true, plaintiff was not damaged because defendant received only the fair market value of the work it performed.

2. Whether, on motion for summary judgment, a District Court either errs as a matter of law, or commits an abuse of discretion, in giving collateral estoppel effect on the issue of antitrust damages to a contract arbitration award.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARTIES BELOW

Petitioner Kaiser Cement Corporation ("Kaiser") is engaged in the manufacture and sale of cement and owns, *inter alia*, a cement plant in Permanente, California. [1]

Respondents Howard P. Foley Co. ("Foley") and Fischbach and Moore, Inc., ("Fischbach") are electrical contracting companies doing business throughout the United States. Respondent Roy M. Butcher Electric

[1] In addition to seven wholly-owned subsidiaries, Kaiser Cement Corporation owns 90% of the stock of Kaiser Cement (Hong Kong) Limited.

("Butcher") is an electrical contractor doing business primarily in the San Francisco Bay area.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 793 F.2d 1100 (9th Cir. 1986) and appears as Appendix A, pp. A-1 - A-8. The opinion of the District Court granting summary judgment against Kaiser is unpublished (N.D. Cal. 1984) and appears as Appendix B, pp. B-1 - B-9. The opinion of the Court of Appeals for the Ninth Circuit in the related arbitration action, *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.* (*Kaiser Cement & Gypsum Corp. v. Howard P. Foley Co.*), is reported at 791 F.2d 1334 (9th Cir. 1986) and appears as Appendix C, pp. C-1 - C-18. The opinion of the District Court denying Kaiser's Rule 60(b) motion in the related arbitration action is unpublished (N.D. Cal. 1983) and appears as Appendix D, pp. D-1 - D-15.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 7, 1986. Kaiser did not file a petition for rehearing. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1 (1982) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

A. Jurisdiction and Timeliness of Appeal Below

Kaiser appealed from a final decision of the United States District Court for the Northern District of California entering summary judgment against it pursuant to Rule 56, Fed. R. Civ. P. The District Court had subject matter jurisdiction over the proceedings below pursuant to 15 U.S.C. § 15, 18 U.S.C. § 1964(c), and 28 U.S.C. § 1331. The Ninth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 which vests the circuit courts of appeal with jurisdiction over "all final decisions of the district courts of the United States."

The District Court's order granting summary judgment against Kaiser was entered on March 21, 1985. On April 1, 1985, Kaiser's notice of appeal was timely filed pursuant to 28 U.S.C. § 2107 and Rule 4(a), Federal Rules of Appellate Procedure.

B. Statement of Facts

1. Background[2]

In the District Court action, Kaiser introduced evidence that Foley, Fischbach and Butcher conspired to rig the bids for the electrical contracting work on the modernization of Kaiser's Permanente, California cement plant. This evidence was the declaration of a former high level Foley official who was a percipient witness to the bid-rigging conspiracy. On motion for summary judgment, these facts were to be taken as true by the District Court. *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097, 1101 (9th Cir. 1979), *rev'd on other grounds*, 446 U.S. 643, 100 S.Ct. 1925 (1980).

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[2]This section is based on the Declaration of Rick Erwin, CR 162, Exhibit 6.

Foley, Fischbach and Butcher originally agreed that Fischbach would receive the Permanente project contract. Foley and Butcher were to submit "complementary bids" in return for favorable future considerations on other Bay area construction projects. In the event, however, when Kaiser expressed an interest in awarding the Permanente project to Foley, Foley betrayed Fischbach and successfully sought the contract for itself. The high profit margin, and the possibility of making even more money from anticipated change orders, were too great for Foley to resist.

Foley's original internal cost estimate for the Permanente project was $3.7 million. Its complementary bid — a figure given to Foley by Fischbach — was approximately $5.2 million, a difference of $1.5 million. When Foley decided to get the Permanente project for itself, it submitted to Foley a revised bid of $5,221,000 that offered Kaiser optional reductions of $450,000. Following negotiations, Kaiser and Foley agreed to $420,000 in optional deductions for reduced performance *and* to reducing Foley's cost estimate by some $400,000. Foley's revised cost estimate was approximately $3.3 million (the original $3.7 million estimate minus $400,000) and the agreed contract price was just over $4.8 million. Foley's $1.5 million profit margin — which existed only because of the bid-rigging conspiracy — therefore remained intact. The Kaiser-Foley accord was a lump sum contract — Foley agreed to perform all specified work for $4.8 million. It is undisputed that Kaiser paid Foley the agreed upon contract price of $4.8 million.

The District Court had no evidence before it that the $4.8 million contract reflected the value of Foley's work in a competitive market. Similarly, the District Court had before it no evidence that Foley would have been awarded

the Permanente project contract in a competitive bidding process.

2. The Arbitration Proceedings

After completion of construction, there were a number of outstanding disputes between Kaiser and various contractors on the Permanente project. On November 23, 1981, the United States District Court for the Northern District of California, the Honorable William Schwarzer, ordered that these claims be arbitrated as provided in the individual contracts between Kaiser and the respective contractors, and further ordered that the multiple arbitrations be coordinated. (CR 162, Exhibit 2).

Prior to the arbitration, Kaiser had already voluntarily paid to Foley $8.3 million, consisting of the original $4.8 million contract price and an additional $3.5 million in change order claims. Foley submitted to arbitration unresolved additional claims for change orders, and for delay and disruption, totaling approximately $5.8 million. (Watson Decl. ¶ 11 & 12).

On May 31, 1983, the arbitrators awarded Foley $3,786,194. (CR 162, Exhibit 4). The arbitration award contained no findings of fact or conclusions of law and set forth no reason for the arbitrators' decision. Judge Schwarzer entered judgment confirming the arbitration award in Foley's favor on August 5, 1983.

3. Kaiser's Rule 60(b) Motion to Set Aside The Judgment Confirming the Arbitration Award

On August 3, 1984, Kaiser moved pursuant to Rule 60(b), Fed. R. Civ. P. to set aside the judgment confirming the arbitration award on the ground that Foley had procured the award by introducing fabricated documents

and perjured testimony into the arbitration hearings.[3] Judge Schwarzer denied Kaiser's Rule 60(b) motion.

For purposes of this Writ, the key aspect of Judge Schwarzer's opinion is the language that *suggests* that the arbitration award was made on a "cost-plus" basis, i.e., that the arbitrators calculated Foley's total costs of performance on the Permanente project, deducted the $8.3 million voluntarily paid to Foley by Kaiser before arbitration, and awarded Foley the difference plus 15% for overhead and profit:

> While it is not self-evident how the arbitrators determined the amount of the award, Foley asserts that the award was determined by calculating the amount needed to compensate Foley for its total costs plus a percentage for overhead and profit. Kaiser has also acknowledged that this was the basis of the calculation .... In the subsequent Midwest Conveyor arbitration arising out of the same project, Kaiser asserted an indemnity claim for a portion of the arbitration award to Foley; it there described the Foley award as being based on Foley's costs, plus 15% overhead and profit.

(CR 162, Exhibit 5: 8-9)

However, Judge Schwarzer made no actual finding of fact that the arbitration award was made on a cost-plus basis. On the contrary, Judge Schwarzer's opinion explicitly

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[3]Kaiser's motion was based on the testimony — tantamount to a confession — of Rick Erwin. Erwin came forward in June 1984, nearly a year *after* the arbitration award had been confirmed, after first having been granted immunity from prosecution and testifying before a federal grand jury in San Francisco. (Erwin Decl. ¶ 5) He admitted participating in the bid-rigging conspiracy and preparing fabricated documents that were introduced into evidence during the arbitration hearings. (Erwin Decl. ¶ 7-21).

states that "it is not self-evident how the arbitrators determined the amount of the award." (CR 162, Exhibit 5: 8)

4. The Antitrust Action

On August 2, 1983, Kaiser commenced its antitrust action in the United States District Court for the Northern District of California, the Honorable William H. Orrick, three days before Judge Schwarzer entered judgment confirming the arbitration award. The trial court entered summary judgment against Kaiser on March 4, 1985 (CR 177), and dismissed Kaiser's lawsuit on March 18, 1985 (CR 178).

Summary judgment was entered because the trial court concluded Kaiser had sustained no cognizable antitrust damages from the price-fixing conspiracy. Treating the concepts of "fair market value" and "cost-plus" contract as one and the same, the trial court concluded that the arbitrators made a cost-plus award and that Foley therefore had only received from Kaiser the fair market value of the work it performed on the Permanente project. (CR 177: 5, 9).

"In essence," the District Court said, "the argument over whether Kaiser's payments to Foley exceeded the fair market value of the work done is an argument over the nature of the arbitrator's decision". (CR 177: 5) The District Court resolved the argument about the nature of the arbitration award simply by quoting from Judge Schwarzer's opinion to support its own position. (CR 177: 6) Observing that both Kaiser and Foley had earlier taken the position that the arbitration award was made on a "cost-plus" basis, the District Court below made the "natural inference" that Judge Schwarzer had accepted that characterization of the arbitration award. (CR 177: 7) However, while acknowledging that the arbitrators did

not — and were not required to — give a reason for their decision, the District Court nonetheless stated that "the evidence is clear that the arbitrators [sic] decision rested on a 'cost-plus' formula as Foley has contended." (CR 177: 9) On this basis the District Court concluded that Kaiser was not damaged because the arbitrators had only awarded Foley the fair market value (i.e., the actual cost) of its work notwithstanding that there was before no evidence that Foley would have received "fair market value" for its performance in a competitive market. (CR 177: 9).

C. The Court Below Incorrectly Applied The Measure of Antitrust Damages

The District Court erred in determining on summary judgment that the arbitrators used a cost-plus formula and compounded this error by ruling that a cost-plus/fair market value arbitration award destroyed Kaiser's antitrust damages claim. The trial court concluded that — *regardless of the bid-rigging* — Foley was entitled to payment for the fair market value of its work on the Permanente project and that "fair market value" comprised actual costs plus a reasonable profit. (CR 177: 5, 9). The District Court's determination on these issues was upheld by the Ninth Circuit.

The District Court's ruling on the damage issue is inexplicable. Petitioner knows of no cause standing for the proposition that a bid-rigger is entitled to the fair market value of his performance or that he may fix prices at a "reasonable" [or "competitive"] level without running afoul of the antitrust laws. *See United States v. Trenton Potteries Co.,* 273 U.S. 392, 397-398, 47 S.Ct. 377, 379 (1927). *Any* conduct by members of a price-fixing combination or conspiracy that interferes with the free play of market forces — whether by raising, lowering, or stabilizing prices — is illegal price-fixing, even though the

price-fixers are unable to control the market. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 221-222, 60 S.Ct. 811, 843-844 (1940). Even assuming, *arguendo,* that Foley conspired to rig the bid only at "fair market value", its conduct constituted illegal price fixing. *Id.*

Horizontal price-fixing or bid-rigging is, of course, "perhaps the paradigm of an unreasonable restraint of trade." *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 104 S.Ct. 2948, 2960 (1984). As the Ninth Circuit has said "[p]rice-fixing brought about by contract, combination, or conspiracy is unquestionably *per se* illegal." *Dunn v. Phoenix Newspapers, Inc.,* 735 F.2d 1184, 1187 (9th Cir. 1984). *See Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 347, 102 S.Ct. 2466, 2474 (1982). The idea that a bid-rigging conspiracy can exist without the plaintiff being damaged plainly is counterintuitive. Once the existence of bid-rigging is established the existence of damages implicitly is established, as well. This point was made in *Ohio Valley Electric Corp. v. General Electric Co.,* 244 F.Supp. 914, 933 (S.D.N.Y. 1965), where the court stated that "in a price fixing case, impact [i.e., liability] and damages are *coextensive*; the overcharge constitutes the plaintiff's injury (impact) as well as the measure of his damage (damages) . . ." (emphasis added). *See also In Re Mid-Atlantic Toyota Antitrust Litigation,* 560 F.Supp. 760, 785 (D. Md. 1983).

The measure of damages in price-fixing cases is well recognized: "Plaintiffs are entitled to recover the overcharge stemming from the illegal combination — *i.e.,* the difference between the prices actually paid *and the prices that would have been paid absent the conspiracy.*" *Burlington Industries, Inc. v. Milliken & Co.,* 690 F.2d 380, 385 (4th Cir. 1982), *cert. denied sub nom. Milliken Research Corp. v. Burlington Industries, Inc.,* 461 U.S. 914, 103

S.Ct. 1893 (1983) (emphasis added). *See also, In Re Mid-Atlantic Toyota Antitrust Litigation*, 560 F.Supp. at 785; *National Constructors Association v. National Electrical Contractors Association*, 498 F.Supp. 510, 538 (D. Md. 1980), *modified*, 678 F.2d 492 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1234, 104 S.Ct. 26 (1983), *cert. dismissed sub nom. International Brotherhood of Electrical Workers v. National Constructors Association*, 463 U.S. 1233, 104 S.Ct. 26 (1983); *Ohio Valley Electric Corp.*, 244 F.Supp. at 933.

The District Court recognized the proper measure of damages but failed to apply this standard correctly to the facts of this case. Its analysis reflected an inadequate grasp of the realities of a *competitive* market place. Sellers do not always get "fair market value" for their products. In the face of adverse or unsettled market conditions, sellers will sell at — or *even below* — cost to minimize their losses. Such behavior is typical for the construction industry during slack times. Market conditions in the construction industry sometimes force contractors to bid projects at or below cost in order to keep their crews intact. (RT 1/4/85: 28) Kaiser adduced evidence that at the time the Permanente project was bid, prevailing market conditions in the Bay area construction industry were such that contractors indeed were bidding projects at or below cost for this purpose. (Erwin Decl., CR 162, Exhibit 6: 15) Because it was bidding construction jobs at cost at the time, Foley, "but for" the bid-rigging, would not have received the "fair market value" of its work on the Permanente project [and therefore would not have made a profit.] Indeed, in a *competitive* market, it might not have been awarded the job at all.

D. An Arbitration Award Cannot Be Accorded Collateral Estoppel Effect On The Issue of Antitrust Damages

The District Court's determination that Kaiser had not been damaged resulted directly from its decision to give preclusive effect to the arbitration award on the antitrust damage issue. As the District Court said:

> In essence, the argument over whether Kaiser's payments to Foley exceeded the fair market value of the work done is an argument over the nature of the arbitrator's decision.

(CR 177: 5)

The District Court undertook no independent factual analysis to determine "the nature of the arbitrator's decision." Instead, it looked only to Judge Schwarzer's opinion. It interpreted Judge Schwarzer's opinion as tantamount to a finding of fact that the arbitration award was made on a cost-plus basis and then gave the arbitration award preclusive effect, *but* Judge Schwarzer made *no* such finding. On the contrary, Judge Schwarzer explicitly stated that it was "not self-evident how the arbitrators determined the amount of the award" because they "gave no reason for their award, nor are they required to do so." (CR 162, Exhibit 5: 8).

At the time the arbitration proceedings occurred, Kaiser had no tangible evidence of the bid-rigging conspiracy. Thus, at that time, Kaiser had no reason to think that by submitting the damage dispute with Foley to arbitration, it also was allowing the arbitrators to resolve the issue of antitrust damages as well. However, once the bid-rigging conspiracy became known, the trial court's subsequent decision to give the arbitration award preclusive effect on the issue of antitrust damages was tantamount

to allowing a crucial antitrust issue to be resolved by the private arbitration process rather than by the courts.

1. Because Antitrust Claims are Non-Arbitrable Arbitration Awards Should Not be Given Collateral Estoppel Effect in Antitrust Cases

Federal antitrust claims are non-arbitrable. Every Circuit Court that has considered this issue has reached this conclusion.[4] *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1479 (9th Cir. 1984); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980, 983 (9th Cir. 1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 715-16 (9th Cir. 1968); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 162-63 (1st Cir. 1983), *rev'd on other grounds*, ___ U.S. ___, 105 S.Ct. 3346 (1985); *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *University Life Insurance Co. v. Unimarc, Ltd.*, 699 F.2d 846, 850-51 (7th Cir. 1983); *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116, 117 (7th Cir. 1978).

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[4]The Supreme Court's recent decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ___ U.S. ___, 105 S.Ct. 3346 (1985) is not to the contrary. This case involved the validity of an agreement between an American company and a Japanese company to arbitrate all controversies between them. The Supreme Court explicitly stated it was *not* considering the issue of whether, in a domestic context, private parties could agree to arbitrate antitrust claims. In upholding the validity of such agreements in an *international context only*, the Court emphasized that its decision was a response to America's special role in the interdependent international economy. "[W]e concluded," the Court said, "that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement . . ." *Id.* at 3355.

In the wake of the Supreme Court decisions in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238 (1985) and *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S.Ct. 1799 (1984) it now appears that arbitration proceedings are to have no collateral estoppel effect in the litigation of non-arbitrable federal claims. In *Byrd* — a case arising under the Securities Exchange Act of 1934 — the Supreme Court stated that "it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of non-arbitrable federal claims." *McDonald* (§ 1983 of the Civil Rights Act) is last of a pre-*Byrd* trilogy of cases holding that preclusive effect should not be given to arbitration awards when important federal statutory policies are involved. In the two earlier cases, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974) (Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq.) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437 (1981) (Fair Labor Standards Act, 29 U.S.C. § 201, et seq.) the Supreme Court's decisions "were based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes." *McDonald*, 104 S.Ct. at 1803-04 (citations omitted).

The principle expressed in *Byrd* and *McDonald* was recently reiterated in *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir. 1985). There, the court stated that "with respect to an important nonarbitrable federal claim, a federal court should be hesitant to preclude the litigation of the federal claim based on the collateral estoppel effects of a prior arbitration award."

Superficially, this petition requires this court to reconcile two conflicting policies: upholding the values ad-

vanced by arbitration process — the prompt and economical resolution of disputes — and the important public policies that underlie the federal antitrust laws, *cf. Wilko v. Swan*, 346 U.S. 427, 438, 74 S.Ct. 182, 188-89 (1953). In reality, this apparent clash of public policies is illusory because there are exceptionally strong policy arguments that weigh against giving preclusive effect to arbitration decisions in antitrust cases.

The primary reason that antitrust claims are not arbitrable is simple: the public policies they embody are too important to be resolved in a non-judicial setting. It was Chief Justice Hughes who described the Sherman Act as a "charter of freedom", tantamount to a constitutional provision. *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359-360, 53 S.Ct. 471, 474 (1933). In *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 1135 (1972) the Supreme Court stated that:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

As Justice Stevens recently said, questions arising under the Sherman and Clayton Acts are among the most important in public law. *Mitsubishi Motors Corp.,* 105 S.Ct. at 3367.

Unlike arbitration — which is a private affair regulated by contract between the parties — enforcement of the antitrust laws is a matter of *public* concern. This is why Congress has provided a comprehensive regime for their enforcement by private parties. As stated in *American Safety Equipment Corp.,* 391 F.2d 821:

> A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.

Id. at 826-27. (Citation omitted). *See also, Lake Communications,* 738 F.2d at 1479.

Moreover, because arbitration proceedings lack the safeguards of the judicial process they are an inappropriate forum for resolving antitrust issues.

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, expresses "a strong federal policy in favor of arbitration as a 'prompt, economical and adequate solution of controversies.' " (citations omitted). *Lake Communications,* 738 F.2d at 1478. In *Wilko* and *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 512, 94 S.Ct. 2449, 2453 (1974) the Supreme Court observed that commercial arbitration is a desirable alternative to the cost, delay and complexity of litigation. "The object of arbitration is to achieve a final disposition of disputes in an easier, more expeditious and less expensive manner than by litigation, and it is a favored method of settling disputes." R. Rodman, *Commercial Arbitration,* § 1.2 (1984). Arbitration is an efficient dispute-resolving mechanism because it dispenses with normal judicial procedures and safeguards. Arbitrators generally need not apply principles of substantive law or the judicially developed rules of evidence. M. Domke, *Domke On Commercial Arbitration,* § 1.01 (rev. ed. 1983). Finally, the discovery procedures of the Federal Rules of Civil Procedure are not available in arbitration proceedings. *Penn Tanker Co. v. C. H. Z. Rolimpex, Warszawa,* 199 F.Supp. 716, 717-18 (S.D.N.Y. 1961); *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.,* 25 F.R.D. 9, 11 (E.D. Pa. 1960); *Empresa Maritima De Transportes, S.A. v. Transatlantic & Pacific*

Corp., 200 F.Supp. 520 (S.D.N.Y. 1959). *See also* R. Rodman, *Commercial Arbitration,* § 17.1; G. Goldberg, *A Lawyer's Guide to Commercial Arbitration,* at 40-41 (2d ed. 1983).

But these advantages of arbitration become vices when antitrust issues are involved. The antitrust laws are too important, and antitrust issues are too complicated, to be entrusted to arbitration's simplified dispute-resolving mechanisms. *American Safety Equipment,* 391 F.2d at 827; *Lake Communications,* 738 F.2d at 1479. As the Supreme Court noted in *McDonald,* 104 S.Ct. at 1803-1804 arbitrators lack the expertise to handle complex legal questions and "arbitral factfinding is generally not equivalent to judicial factfinding." *See also Lake Communications,* 738 F.2d at 1479.

Assume, *arguendo,* that the facts below were slightly different and that Kaiser had known about the price-fixing *before* arbitration commenced. Foley *never* would have been allowed to submit the antitrust issues to arbitration over Kaiser's objection. The fact that Kaiser only obtained tangible evidence of the bid-rigging conspiracy well after the arbitration proceedings had concluded does not alter the result; public policy does not permit the arbitration of antitrust issues. As stated in *American Safety Equipment,* 391 F.2d 821:

> [T]he pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear. In some situations Congress has allowed parties to obtain the advantages of arbitration if they 'are willing to accept less certainty of legally correct adjustment,' . . . but we do not think that this is one of them. In short, we conclude that the antitrust claims raised here are inappropriate for arbitration.

Id. at 827-828. *See also Lake Communications,* 738 F.2d at 1482 ["The complexity of antitrust issues and the significant public interest in antitrust enforcement are additional reasons for denying preclusive effect to an arbitration decision on antitrust issues."] Simply put, antitrust issues are too important to be left to arbitrators. Justice Stevens has given this point eloquent expression:

> *Despotic decision making* of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets. Instead of "muffling a grievance in the cloakroom of arbitration," the public interest in free competitive markets would be better served by having the issues resolved "in the light of impartial public court adjudication." *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 136 (1973).

Mitsubishi Motors, 105 S.Ct. at 3370.

The District Court should not have given the preclusive effect to the arbitration award and the Ninth Circuit should not have upheld the District Court's action. Arbitration was not the proper forum for deciding the issue of antitrust damages.

2. The Arbitration Decision Cannot Have Preclusive Effect Because The Basis of the Arbitrators Decision is Unknown

The strong public policy reasons discussed above suggest that as a matter of law arbitration awards cannot be

afforded collateral estoppel effect in antitrust cases. However, even assuming that in a context such as this preclusive effect might be afforded to an arbitration award, Kaiser submits that it was an abuse of discretion for the District Court to do so in this lawsuit. As the Ninth Circuit has frequently reiterated, "the application of collateral estoppel is discretionary." *Lake Communications,* 738 F.2d at 1482; *True Drilling Co. v. Donovan,* 703 F.2d 1087, 1093 (9th Cir. 1983). As the Ninth Circuit stated in *Western Oil & Gas Association v. United States Environmental Protection Agency,* 633 F.2d 803 (9th Cir. 1980):

> *Collateral estoppel is not to be applied mechanically.* In proper circumstances it can prevent the waste of judicial resources and shield litigants from duplicative and often vexatious lawsuits. As the Supreme Court recently has recognized, however, *countervailing policies may justify a refusal to apply principles of estoppel.*

Id. at 809-810 (citations omitted) (emphasis added).

The arbitrators gave no reasons for their decision. They simply made two discrete lump sum awards — one for change orders, the other for delay and disruption — and awarded Foley the combined total of these lump sums. This is *all* the arbitrators did. There is no way that Judge Schwarzer, or the District Court, could have known what the basis of the arbitration was. Under these circumstances, it was wrong for the District Court to first determine the award was made on a cost-plus basis, and then to give the award preclusive effect on the issue of antitrust damages.

Of course, "[a]rbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 598, 80 S.Ct. 1358, 1361 (1960); *United Steel-*

workers of America v. American Smelting & Refining Co., 648 F.2d 863, 870 (3d Cir.), *cert. denied,* 454 U.S. 1031, 102 S.Ct. 567 (1981); *Shearson Hayden Stone, Inc. v. Liang,* 653 F.2d 310, 312 (7th Cir. 1981); *John T. Brady & Co. v. Form-Eze Systems, Inc.,* 623 F.2d 261, 264 (2d Cir.), *cert. denied,* 449 U.S. 1062, 101 S.Ct. 786 (1980). To require arbitrators to explain and justify their awards would undermine the very purposes that arbitration is intended to further. *Sobel v. Hertz, Warner & Co.,* 469 F.2d 1211, 1215 (2d Cir. 1972). It is equally well-settled that "courts will not look beyond the lump sum award in an attempt to analyze the reasoning processes of the arbitrators" *Kurt Orban Co. v. Angeles Metal Systems,* 573 F.2d 739, 740 (2d Cir. 1978) (citation omitted); *Ballantine Books, Inc. v. Capital Distributing Co.,* 302 F.2d 17, 22 (2d Cir. 1962); *Koch Oil, S.A. v. Transocean Gulf Oil Co.,* 751 F.2d 551, 554 (2d Cir. 1985).

The District Court went astray precisely because it went behind a lump sum arbitration award and sought to determine the rationale of the arbitrators' award. In contrast, in the arbitration proceedings, Judge Schwarzer made it plain that the court would not go beyond the arbitrators' decision. The District Court should not have gone behind the arbitration award either.

There is a good reason why it should not have done so and why the arbitration award cannot have any preclusive effect whatsoever. Arbitration is a "black box" decision-making process system. In such a system, one can determine what goes into the black box (evidence) and what emerges (the arbitration award) but not what goes on inside it (the reasons for the award). One cannot determine the basis of an arbitration award precisely because the arbitrators file no written decision, or findings of fact, to explain the reasons for their decision. This makes it extremely difficult for a court to review the arbitration

award and makes it hard to know, for collateral estoppel purposes, what the arbitrators actually decided.[5]

In this respect, arbitration stands in contradistinction to federal civil practice where courts are required by Rule 52, Fed. R. Civ. P. to give findings of fact and conclusions of law in support of their decisions in non-jury trials. As stated in *Featherstone v. Barash,* 345 F.2d 246 (10th Cir. 1965):

> The purposes of this rule are to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court, *to make definite what is decided in order to apply the doctrines of estoppel and res judicata to future cases,* and to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute.

Id. at 249 (emphasis added).

See also International Association of Machinists & Aerospace Workers v. United Aircraft Corp., 534 F.2d 422, 433 (2d Cir. 1975), *cert. denied,* 429 U.S. 825, 97 S.Ct. 79

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[5]It is important to remember, too, that a district court confirming an arbitration award is not at all in a position analogous to an appellate court reviewing a trial court's decision. At the confirmation stage, Judge Schwarzer's function was almost solely ministerial. Arbitration awards are reviewable only for manifest disregard of the law and it is "only clear evidence of impropriety which justifies the denial of summary confirmation of an arbitration award." *Ormsbee Development Co. v. Grace,* 668 F.2d 1140, 1147 (10th Cir.), *cert. denied sub nom. Grace v. Santa Fe Pacific Railroad Co.,* 459 U.S. 838, 103 S.Ct. 84 (1982); *National Bulk Carriers, Inc. v. Princess Management Co.,* 597 F.2d 819, 825 (2d Cir. 1979). As Justice Stevens has observed "the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable." *Mitsubishi Motors,* 105 S.Ct. at 3370. This is another strong reason why the District Court should not have given preclusive effect to the arbitration.

(1976); *Colorado Flying Academy, Inc. v. United States,* 724 F.2d 871, 877 (10th Cir. 1984), *cert. denied,* ____ U.S. ____, 106 S.Ct. 2915 (1986); *Gupta v. East Texas State University,* 654 F.2d 411, 415 (5th Cir. 1981); *Complaint of Ithaca Corp.,* 582 F.2d 3, 4 (5th Cir. 1978); *Leighton v. One William Street Fund, Inc.,* 343 F.2d 565, 567 (2d Cir. 1965); *Lundgren v. Freeman,* 307 F.2d 104, 114 (9th Cir. 1962).

Precisely because the arbitrators offered no justification for their decision, their award cannot have any probative value on the antitrust issues in this case. The courts long have recognized that ambiguous arbitration awards cannot have preclusive effect in subsequent litigation. And it is the absence of findings of fact that make an arbitration award ambiguous. *Ufheil Construction Co. v. Town of New Windsor,* 478 F.Supp.766,768-769 (S.D.N.Y. 1979), *aff'd without opinion,* 636 F.2d 1204 (2d Cir. 1980). As stated in *Brownko International, Inc. v. Ogden Steel Co.,* 585 F.Supp. 1432 (S.D.N.Y. 1983):

> [T]he award has no probative value in this litigation. Where a previous arbitration award is ambiguous in respect of what issues were decided, it necessarily has a limited value in subsequent litigation. That is so, even where that litigation is between the same parties who were involved in the arbitration.

Id. at 1435 (citation omitted).

Here, the reasons for the arbitration award are not merely ambiguous, they are utterly impenetrable. There is no basis — rational or otherwise — on which the court below could have determined that the arbitrators used a cost-plus formula and thereby conclude that Kaiser sustained no antitrust damages because Foley received only the fair market value of its work on the Permanente project.

I

CONCLUSION

The District Court's entry of summary judgment against Kaiser was predicated on its finding that Kaiser had incurred no antitrust damages. This finding rested in turn on the District Court's determination — on the basis of collateral estoppel — that the arbitration award was made on a cost-plus basis. But the District Court should not have given preclusive effect to an arbitration award on the issue of antitrust damages. Moreover, there is no way the District Court could determine that the arbitration award was made on a cost-plus basis because the arbitrators gave no reason for their decision.

The Ninth Circuit's affirmance of the District Court's decision will lead to pernicious public policy effects in this case and in similar cases. Price-fixers will have a strong incentive to take contractual disputes to arbitration. They will use arbitration awards to collaterally estop the victims of price-fixing by arguing that the arbitration resolved the antitrust issues against the victim. Such a result would be egregious. At the least, it will be an inducement for price-fixers to misuse arbitration and thus will call into question the integrity of the arbitration process; and honest litigants will hesitate to arbitrate disputes. More importantly, the purpose of the federal antitrust laws will be badly undermined if price-fixers can brandish arbitration awards as shields insulating them from liability for their *per se* violations of the antitrust laws.

The Ninth Circuit's affirmance of the District Court's decision raises serious questions about the proper measure of damages to be employed in price-fixing cases and seriously implicates the relationship between the private arbitration process and the antitrust laws. Guidance from this Court is needed and Certiorari should be granted.

Dated: September 19, 1986

Respectfully submitted,

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Kaiser Cement Corporation

APPENDIX A

KAISER CEMENT CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,

v.

FISCHBACH AND MOORE, INC.,
the Howard P. Foley Co.,
a District of Columbia corporation,
Defendants-Appellees.

No. 85-1846.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted January 15, 1986.
Decided July 8, 1986.

On Appeal From the United States District Court for the Northern District of California.

Before POOLE, BEEZER and KOZINSKI, Circuit Judges.

BEEZER, Circuit Judge:

Kaiser appeals a grant of summary judgment for defendants.[1] Kaiser claims that defendants conspired to fix prices in the electrical construction industry in violation of the Sherman Act, 15 U.S.C. § 1,[2] California's Cart-

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[1]Appellee Fischbach and Moore, Inc. ("Fischbach"), one of the unsuccessful bidders for the contract awarded to Foley, joins in this appeal pursuant to Ninth Circuit Rule 13(j).

Kaiser's antitrust claim was before Judge Orrick.

The arbitration confirmation, *LaFarge Conseils et Etudes v. Kaiser Cement and Gypsum Corp.*, 791 F.2d 1334 (9th Cir.1986), was presided over by Judge Schwarzer.

[2]On December 11, 1985, Frank Lench was convicted of two counts of obstruction of justice in *United States v. Frank P. Lench* in the

wright Act, Cal.Bus. & Prof.Code ¶ 16720 et seq., and the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. Kaiser also claims that defendants committed fraud.[3] The district court held that Kaiser could not establish any damage and granted summary judgment. We AFFIRM.

FACTS

In 1979, Kaiser invited bids from several electrical construction companies for work at its Permanente, California cement plant. Three companies submitted bids, Fischbach & Moore, Inc. (Fischbach), the Howard P. Foley Company (Foley), and Roy M. Butcher Electric (Butcher). Kaiser alleges that Foley, Fischbach, and others conspired to fix bid prices.

Kaiser awarded the contract to Foley. Under the contract, Kaiser assumed the responsibility of coordinating the work. Foley's work was to be completed within ten and a half months but actually took 24 months. Foley

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N.D.Cal., No. 85-613. Kaiser cites this conviction in support of its claims of fraud in the arbitration and bid rigging.

Kaiser alleged that Foley violated § 1 of the Sherman Act, 15 U.S.C. § 1 in that Foley:

(a) agreed to allocate among themselves electrical construction projects, including the project at Kaiser's Permanente cement plant;

(b) agreed to fix the prices at which electrical construction projects, including Kaiser's Permanente cement plant, were bid, and

(c) agreed to submit noncompetitive, collusive, complimentary, and rigged bids, or to refrain from bidding, for electrical construction projects, including the project at Kaiser's Permanente cement plant.

[3]Kaiser requested trebled damages in accordance with Section 4 of the Clayton Act and 18 U.S.C. § 1964(c), injunctive relief, costs and attorneys' fees, and punitive damages.

anticipated expending 67,000 manhours but actually used 216,000. Foley claimed that Kaiser had breached the contract and that Foley's extra costs resulted from that breach.[4]

Foley filed a state court action to compel arbitration as required by the contract. Upon removal, the district court ordered serial arbitration between Kaiser and Foley and also between Kaiser and other contractors involved in the Permanente Project. The Kaiser-Foley arbitration panel received extensive oral and documentary evidence. The arbitrators awarded Foley $330,998 for change orders

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[4]Foley's counsel, Mr. McInerney, explained how Kaiser breached the contract.

> [Kaiser] entered into multi-prime contracts with various contractors and it and only it can coordinate activities of these contractors. When they had them on the job site, Kaiser Cement increased the scope of the work of almost every contractor on the job, sometimes by as much as 100, 200 percent of various change orders. They had contractors literally working on top of each other which resulted in inefficiency.
>
> The evidence also showed that the drawings were changed, the construction drawings were considerably changed and altered by Kaiser during the course of construction. That all the materials on this job that was to be erected and installed by the contractors was purchased and fabricated by Kaiser Cement; that the purchase and fabrication were often mishandled; the equipment was often delayed in arriving at the job; the contractors in many cases had no place to work and were directed by Kaiser to just go out and find a place to work.
>
> The evidence further showed in our particular case, the Foley case, we had literally emptied the union hall in Santa Clara. There was just simply no other electricians to be had. We had so many men on the job and they were told don't discharge them, send them to find some work for them at other places.

Transcript of August 5, 1983 hearing, pages 7-8.

and $3,455,206 for delay and disruption.[5] The arbitration panel did not explain the basis upon which it calculated the award amounts.[6] The panel considered evidence of Foley's actual costs,[7] an audit requested by the arbitrators, exhibits 2 and 7, which may have been fabricated, and Frank Lench's testimony which was claimed to be false.[8] Kaiser argues that the arbitrators based the award on the fraudulent evidence. On August 5, 1983, the district court observed that "[I]t is not self-evident how the arbitrators determined the amount of the award." Kaiser reasons, however, that the award incorporates the fixed price and therefore constitutes injury.

Three days before confirmation of the award, Kaiser filed this antitrust action. The district court granted Foley's motion for summary judgment on March 4, 1985, stating that "[t]he arbitrators having determined the actual cost of Foley's work and the fair compensation to which Foley is entitled for that work, there remains no genuine issue of material fact because there can be no

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[5]Prior to the award, Kaiser paid Foley $8.3 million, consisting of the $4.8 million contract price and $3.5 million in additional change orders.

[6]Arbitrators are not required to state the reason for their award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). The district court noted the pivotal role played by the ambiguous award in the antitrust litigation. "In essence, the argument over whether Kaiser's payments to Foley exceeded the fair market value of the work done is an argument over the nature of the arbitrator's decision."

[7]In his April 1983 letter, arbitrator Anderson told the parties that the panel requested an audit "of Foley's cost records for this project . . . in order to verify the actual costs to Foley to perform the work on this project."

[8]Exhibits 2 and 7, which Kaiser's consultant Erwin claims to have fabricated, were introduced in the arbitration.

damage to Kaiser." The RICO, Cartwright Act, and fraud claims were also dismissed because Kaiser failed to establish injury.[9] On appeal the parties raise questions of the preclusive effect of an arbitration award in subsequent antitrust litigation and the applicability of judicial estoppel to Kaiser's argument in the arbitration litigation. We affirm the district court on other grounds and do not consider these issues.[10]

ANALYSIS

Summary judgment is appropriate in antitrust actions when there is no "significant probative evidence tending to support the complaint." *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403, 1406 (9th Cir.1984) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968)). *See Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir.1977). Summary judgment is proper when the moving party establishes that he is entitled to judgment as a matter of law and that no genuine issue of material fact

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[9]Kaiser requested injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26. That section makes injunctive relief available

> under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger or irreparable loss or damage is immediate. . . .

Kaiser neglected to argue the merits of its request at summary judgment and therefore waived its request for an injunction.

[10]We may affirm on any basis present in the record. *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir.1985); *Jewel Cos., Inc. v. Pay Less Drug Stores Northwest, Inc.*, 741 F.2d 1555, 1564-65 (9th Cir.1984).

exists.[11] *Jewel Cos., Inc. v. Pay Less Drug Stores Northwest, Inc.,* 741 F.2d 1555, 1559 (9th Cir.1984). The granting of a summary judgment is reviewed de novo. *Lew v. Kona Hospital,* 754 F.2d 1420, 1423 (9th Cir.1985). On review, we must view the evidence and inferences therefrom in the light most favorable to the party opposing summary judgment. *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1362 (9th Cir.1985); *Jewel Cos.,* 741 F.2d at 1559.

"The initial burden of showing the absence of material factual issues rests on the proponent of a summary judgment motion. Once that burden is met, however, the opponent must counter with specific factual allegations revealing a genuine dispute of fact in order to preclude summary judgment." *International Union of Bricklayers & Allied Craftsman Local Union No. 20 AFL-CIO v. Martin Jaska, Inc.,*752 F.2d 1401, 1405 (9th Cir.1985). A party opposing summary judgment does not have to file any countervailing materials when the movant's papers are insufficient on their face to demonstrate the lack of any material issue of fact. *Lew,* 754 F.2d at 1423; *Sheet Metal Workers' International Association Local No. 355 v. NLRB,* 716 F.2d 1249, 1254 (9th Cir.1983); *Zoslaw v. MCA Distributing Corp.,* 693 F.2d 870, 883 (9th Cir.1982), *cert. denied,* 460 U.S. 1085, 103 S.Ct., 1777, 76 L.Ed.2d 349 (1983). Once the moving party establishes that he would be entitled to a directed verdict at trial unless contradicted, the burden shifts to the opposing party to show that a contradiction is possible. *ALW, Inc. v. United Air Lines, Inc.,* 510 F.2d 52, 55 (9th Cir.1975); *Stansifer v. Chrysler Motors Co.,* 487 F.2d 59, 63 (9th Cir.1973); *Doff v. Brunswick Corp.,* 372 F.2d 801, 804 (9th Cir.1966), *cert. denied,* 389 U.S. 820, 88 S.Ct. 39, 19 L.Ed.2d 71 (1967). If

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[11]A material issue is one that may affect the outcome of the litigation. *Mutual Fund Investors,* 553 F.2d at 624.

the party moving for summary judgment presents evidence which, taken by itself, would establish a right to a directed verdict at trial, the motion must be granted in the absence of any presentation by the opposing party. *THI-Hawaii, Inc. v. First Commerce Financial Corp.,* 627 F.2d 991, 993 (9th Cir.1980); *Neely v. St. Paul Fire & Marine Insurance Co.,* 584 F.2d 341, 343 (9th Cir.1978); *Donnelly v. Guion,* 467 F.2d 290, 293 (2d Cir.1972). The resisting party must respond with more than mere hearsay and legal conclusions. [12] *Doff,* 372 F.2d at 804; *see Commodity Futures Trading Comm'n v. Savage,* 611 F.2d 270, 282 (9th Cir.1979).

To prevail, an antitrust plaintiff must establish a violation of the antitrust laws and an actual injury attributable to something the antitrust laws were designed to prevent. *J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 562, 101 S.Ct. 1923, 1927, 68 L.Ed.2d 442 (1981); *Kapp v. National Football League,* 586 F.2d 644 (9th Cir.1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). Injury is also the sine qua non of recovery by plaintiff on every one of its other theories of recovery. The Cartwright Act, *Lowell v. Mother's Cake & Cookie Co.,* 79 Cal.App.3d 13, 23, 144 Cal.Rptr. 664, 671 (1978); common

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[12] "To hold otherwise would give free rein to any plaintiff who can draft an antitrust complaint capable of withstanding a motion to dismiss to go to trial with only a wing and a prayer supporting his well drafted complaint." *Mutual Fund Investors,* 553 F.2d at 624. An opposing party may not defeat a summary judgment motion, once the movant has met his burden, in the absence of any significant probative evidence tending to support the complaint. *First Nat'l Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968); *Commodity Futures Trading Comm'n v. Savage,* 611 F.2d 270, 282 (9th Cir.1979); *Mutual Fund Investors,* 533 F.2d at 624. "A party may not prevail in opposing a motion for summary judgment by simply overwhelming the district court with a miscellany of unorganized documentation." *Zoslaw,* 693 F.2d at 883.

law fraud, *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 220, 197 Cal.Rptr. 783, 797, 673 P.2d 660, 674 (1983); and RICO, *Sedima S.P.R.L. v. Imrex Co.*, — U.S. —, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985). In sum, without a showing of injury, plaintiff cannot recover.

Thus, Kaiser would have to have proved that Foley violated the antitrust laws by participating in an illegal conspiracy to fix the price of its electrical construction services; and that Kaiser was injured by having paid a price that was fixed and was in excess of the fair market value of the goods or services delivered to Kaiser.

Foley introduced sufficient evidence to indicate that even if a price-fixing conspiracy existed, Kaiser was not injured because the arbitrators awarded Foley an amount they considered to be fair without regard to any bid-rigging.[13] Kaiser failed to rebut Foley's showing that the amount of the arbitrators' award constituted a fair price for Foley's performance under the construction contract. Kaiser failed to show injury and Foley was entitled to summary judgment.

AFFIRMED.

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[13]In its prearbitration brief, Kaiser's expert testimony was summarized by its counsel as follows:

> The result of these and numerous other bidding errors was that Foley's bid grossly underestimated the manpower and supervision required to do the work. The original bid documents have been analyzed by the professional estimating firm of Lee Saylor, Inc. which has concluded that Foley should not have bid less than $6,121,077.00 for the work shown on the original plans and specifications. Instead, Foley bid $4,801,001.00. It is this difference that Foley is now really seeking under the guise of an impact claim.

Kaiser also introduced the expert opinion of Lee Misner which was that Foley underbid the contract. See Exhibit 6.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KAISER CEMENT CORPORATION, a Delaware corporation,
Plaintiff,
vs.
FISCHBACH AND MOORE, INC., a New York corporation; THE HOWARD P. FOLEY CO., a District of Columbia corporation; and ROY M. BUTCHER ELECTRIC, a California corporation,
No. C-83-3554 WHO

MEMORANDUM AND ORDER

This antitrust action, which arises out of the submission of bids by defendant contractors Fischbach and Moore, Inc., The Howard P. Foley Co., and Roy M. Butcher Electric for modernization of plaintiff's, Kaiser Cement Corporation's, Permanente, California plant ("the plant") is before the Court on defendant Howard P. Foley Co.'s motion for summary judgment. Defendant Fischbach and Moore, Inc. joins in this motion. For the reasons stated hereafter, defendants' motion for summary judgment is granted.

I

In the spring of 1979, Kaiser Cement Corporation ("Kaiser") solicited bids from eight electrical contractors; the three defendants were the only bidders. Howard P. Foley Co. ("Foley") was ultimately awarded a $4,800,000 contract after some negotiations. During the course of the contract, Kaiser paid Foley approximately $3,260,000 above the contract price to compensate it for numerous change orders. Despite these payments of over $8,000,000, Foley insisted that it still had not received

adequate compensation, and it sought arbitration to recoup its losses.

On November 23, 1981, Judge William W. Schwarzer of this Court ordered this matter and related actions submitted to a series of arbitrations that were known collectively as *Lafarge Conseils et Etudes, S. A. v. Kaiser Cement & Gypsum Corp.,* Nos. C-81-2263-WWS and C-81-2264-WWS (N.D. Cal.). In his Order, Judge Schwarzer stated that the award should state the total amount of damages to which each of the several claimants was entitled. In addition, he ordered separate special findings on the amount of damages attributable to delay or disruption, and the amount attributable to particular claims for unpaid extras. Throughout the fourteen-day arbitration proceedings, Foley argued that it was entitled to additional payments to compensate for Kaiser's delays, disruptions, and change orders. Kaiser argued that Foley's losses were the result of errors it had made in its original bid, and that these errors arose because Foley *underbid* the contract.

After the hearings were completed, the arbitrators requested an audit by Coopers & Lybrand in order to establish the actual costs to Foley as they were recorded in the Foley project ledgers and files. Foley's motion for summary judgment, Ex. 8. Immediately after receiving this audit on May 31, 1983, the arbitrators issued their decision, awarding Foley a total of $3,786,194; $3,455,206 for delay and disruption, and $330,988 for retention and unpaid change orders. Judge Schwarzer confirmed this award on August 5, 1983, rejecting Kaiser's arguments that the award should be vacated due to inadequacies in the audit.

On August 23, 1984, in a Memorandum of Opinion and Order, Judge Schwarzer again rebuffed an attempt to

vacate the award after a hearing in which Kaiser argued that new evidence had been produced by Rick Erwin, a former Foley employee, which showed that Foley had submitted fabricated evidence about the original bids to the arbitrators; the court held that Kaiser had failed to demonstrate that Erwin's testimony was of such a material nature that it probably would have changed the result of the arbitration and the judgment of the court. *Lafarge Conseils et Etudes, S. A. v. Kaiser Cement & Gypsum Corp.*, Nos. C-81-2263-WWS and C-81-2264-WWS.

Kaiser filed this action on August 2, 1983, two days before the first confirmation of the arbitrators' award. At this point, the third amended complaint alleges both federal and state antitrust violations (Clayton Act § 4, 15 U.S.C. § 15, and Cartwright Act, Cal. Bus. & Prof. Code § 16720 *et seq.*); civil RICO (18 U.S.C. § 1961 *et seq.*), and fraud. In essence, Kaiser now argues that the defendant corporations conspired to inflate by over one million dollars the bids that they submitted for the contracting work.

II

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if the plaintiff cannot raise material issues of fact concerning necessary elements of its damage claim and can show that it is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983). The measure of damages in a price-fixing case is the difference between the prices actually paid and what would have been paid "but for the unlawful conspiracy." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Mande-*

ville Island Farms v. American Crystal Sugar Co., 195 F.2d 622 (9th Cir. 1952), *cert. denied*, 343 U.S. 957 (1954). The RICO, state antitrust, and fraud claims similarly require a showing that the plaintiff has suffered some injury. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 673 P.2d 660, 674 (1983); *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal.App.3d 13, 23, 144 Cal.Rptr. 664, 671 (1978). Foley argues that the plaintiff has failed to show that it has paid more than fair market value as a result of the alleged fraud or price-fixing conspiracy. Foley claims that Kaiser cannot show (1) that the original bid price exceeded fair market value, or (2) that payments made by Kaiser exceeded fair market value, or (3) that any overpayments were caused by an overcharge in the original bid. The Court will first address the second claim because it is dispositive.

III

In essence, the argument over whether Kaiser's payments to Foley exceeded the fair market value of the work done is an argument over the nature of the arbitrator's decision. As Judge Schwarzer recognized in his *Lafarge* Memorandum of Opinion and Order of October 23, 1984, the arbitrators gave no reason for their award, nor are they required to do so. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Foley asserts that the award was determined by calculating the amount needed to compensate it for total costs plus an "add-on" of fifteen percent for overhead and profit. Kaiser asserts that the award was determined by taking the contract price, adding on amounts due for delays, disruptions, and change orders, and subtracting payments already made by Kaiser to Foley. To this Court,

the evidence is clear that the arbitrators decision rested on a "cost-plus" formula as Foley has contended.

In a letter dated April 5, 1983, arbitrator Frank H. Andersen wrote to the parties to tell them that the arbitrators were unable to render a unanimous decision and had thus decided that an audit of the Foley cost records for the project was to be performed to verify the actual cost to Foley. This audit was to establish the costs as they were recorded in the Foley project ledgers and files, and to adjust those figures for such unrelated costs as Workmen's Compensation and self-owned equipment. Foley's motion for summary judgment, Ex. 8. On May 31, 1983, Coopers & Lybrand submitted a comprehensive cost analysis to the arbitrators that found total adjusted costs to Foley of $9,511,899. Foley's motion for summary judgment, Ex. 9 at 9. The arbitration panel immediately decided that Foley was entitled to $3,786,194 over and above monies it had already received.

Although Kaiser now argues that these moneys were awarded merely for previously uncompensated change orders, delays, and disruptions, it has consistently argued in the past that a "cost-plus" formula was used. As Judge Schwarzer stated in his *Lafarge* opinion:

> While it is not self-evident how the arbitrators determined the amount of the award, Foley asserts that the award was determined by calculating the amount needed to compensate Foley for its total costs plus a percentage for overhead and profit. Kaiser has also acknowledged that this was the basis of calculation. In his Declaration in Opposition to the Petition to Confirm the Arbitration Award, June 23, 1983, at 12 n2, Duffy stated that "cost plus 15% was the award." In the hearing on the motion to confirm, Duffy described the arbitrators' calculation by stat-

> ing "[W]hat they apparently did was simply to take the total costs on the job and put some ad-ons [sic] around it and made that an award." Trans. of Proceeding, Aug. 5, 1983, at 4. In the subsequent Midwest Conveyor arbitration arising out of the same project, Kaiser asserted an indemnity claim for a portion of the arbitration award to Foley; it there described the Foley award as being based on Foley's costs, plus 15% overhead and profit. Bryan Decl., Aug. 3, 1984 at ¶ 9.

Lafarge, supra, at 8-9.

Kaiser does not dispute that it has previously argued that the arbitrator issued a "cost-plus" award. Rather, it contends that Judge Schwarzer rejected Kaiser's argument when he confirmed the arbitration award. Imaginatively, Kaiser argues that in the above quoted section of his order, Judge Schwarzer merely stated that he could not determine what the arbitrator had done, and so he would not accept the consistent arguments of Kaiser and Foley. Although some ambiguity exists, the more natural inference is to find that the judge was willing to accept the consistent views of the parties in the absence of a "self-evident" determination by the arbitration panel.

Kaiser finds further support for its view in the section of the *Lafarge* opinion that immediately precedes the above-quoted passage:

> The testimony of Erwin raises issues which are tangential at best. Even accepting Kaisers assertion that Foley's damage claim was based on total costs less estimated costs, applying this formula does not lead to the arbitrators' final award. The arbitration panel awarded Foley $3,455,206 on its delay and disruption claim.

Id. at 8. Kaiser somehow construes these words as a rejection of the argument that the arbitrators employed a cost-plus formula. Rather, Judge Schwarzer clearly indicates that Erwin's testimony regarding fabricated evidence allegedly submitted by Foley to the arbitrators is immaterial because the formula suggested by Kaiser was not used. He does not state that the arbitrators did not employ a cost-plus 15 percent formula.

In a similarly imaginative argument, Kaiser finds further support for its argument in the words of Carroll L. Bryan, II, Foley's counsel in the arbitration proceedings. Kaiser points to Bryan's statements that "it is clear that the Arbitration Award [sic] to Foley had nothing to do with the initial amount of the Foley/Kaiser contract" and that "Testimony concerning Foley's bid was only a very minor aspect of the arbitration." Declaration of Carroll L. Bryan II, Esquire, Ex. 3 at 4-5, attached to Kaiser's opposition. Kaiser argues that this clearly means that the arbitrators accepted the bid price and determined only contractual claims arising out of delay and nonpayment. The arbitrators' lack of attention to the original bids can be interpreted with equal plausibility, however, to arise from a determination based on some type of actual cost-plus formula; such a formula would make the original bids irrelevant.

Perhaps the strongest piece of evidence in support of Kaiser's argument that the arbitrators accepted the bid price and then determined mere contractual disputes about delays and change orders is the wording of the "Special Findings" of the arbitrators' award. Pursuant to paragraph 5 of Judge Schwarzer's Order of November 23, 1981, the arbitrators found that: (a) the amount of the award attributable to delay and disruption is $3,455,206, (b) the amount of the award attributable to retention and

charge orders not paid is $330,988, and (c) the total award is in the amount of $3,786,194. A superficial reading would suggest that the arbitrators accepted the original bid as a floor price and focused only on specific instances of change orders and delays in reaching their award. However, it is possible that the arbitrators determined amounts owed for these factors by using a cost-plus formula. Indeed, given the request for the Coopers & Lybrand audit and the admissions by Kaiser's counsel, there can be no real dispute about this matter.

Kaiser argues that this Court is precluded from granting collateral estoppel or *res judicata* effect to the factual question of damages "adjudicated" in the course of the arbritration. It cites *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984), as holding that the complexity of antitrust issues and the significant public interest in antitrust enforcement require federal courts to deny preclusive effect to arbitration decisions on antitrust issues. Such a reading of *Lake* is overly broad, because the Ninth Circuit explicitly ruled that "the application of collateral estoppel is discretionary," as it allowed some issues not "permeated" with antitrust issues to proceed to arbitration. The court's decision clearly indicates that those contract issues which are not so intertwined with antitrust issues that they cannot be resolved separately, may be resolved in arbitration. *Id.* at 1480. A district court must pay particular attention to the complexity of the issues submitted to arbitration. When the contract issues are of a type commonly resolved by arbitration, the coexistence of discrete antitrust claims will not bar arbitration. *Id.* at 1481. The issue of proper compensation for electrical contracting work is peculiarly within the arbitrators' expertise.

The arbitrators having determined the actual cost of Foley's work and the fair compensation to which Foley is entitled for that work, there remains no genuine issue of material fact because there can be no damage to Kaiser. Therefore,

IT IS HEREBY ORDERED that defendants' motion for summary judgment is granted.

Defendants Foley and Fischbach shall submit a form of judgment to the Court on or before March 11, 1985.

Dated: March 4, 1985.

/s/ WILLIAM H. ORRICK

William H. Orrick
United States District Judge

APPENDIX C

LAFARGE CONSEILS ET ETUDES,
S.A., Plaintiff,

v.

KAISER CEMENT & GYPSUM CORP.,
Defendant-Counterclaimant/Appellant,

v.

The HOWARD P. FOLEY COMPANY,
Counterdefendant/Appellee.

Nos. 84-2764, 84-2765, 85-1789 and 85-1790.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 15, 1986.

Decided June 11, 1986.

On Appeal From the United States District Court for the Northern District of California.

Before: POOLE, BEEZER and KOZINSKI, Circuit Judges

BEEZER, Circuit Judge:

Kaiser Cement Corporation appeals from the district court's denial of its motions to vacate the arbitration award and to set aside a judgment confirming that award. Foley's claims against Kaiser for breach of contract were arbitrated under a contract provision. The panel awarded Foley $3,786,194.[1] Kaiser's first motion to vacate the award was denied, and Kaiser now seeks to vacate the award and set aside the judgment confirming it, arguing that fraud in the arbitration proceedings tainted the award and judgment. Kaiser further argues that Foley is

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[1]The panel awarded Foley $330,998 for change orders and $3,455,206 for delay and disruption.

not entitled to attorney fees and that the existence and amount of the fees was inadequately documented.

We affirm.

FACTS

In 1979, Kaiser invited bids from electrical contractors in preparation for remodeling its cement plant at Permanente, California.[2] The Howard P. Foley Company, Fischbach & Moore, Inc., and Roy M. Butcher Electric were the only companies to submit bids on the project. Erwin, formerly a Foley Company employee, did not testify at the arbitration but gave Kaiser a lengthy account of the bidding agreement between Foley, Fischbach and Butcher after receiving immunity in connection with his grand jury testimony.[3]

Erwin stated that shortly after Kaiser invited bidding on the project, Foley received a phone call from Fred Byrum of Fischbach in which Byrum said he could "control" everyone on that job. Erwin stated that he understood Byrum's statement to mean that "the other bidders would not submit their bids without first checking with Fred Byrum so that he could control the prices submitted by them." Erwin further stated that Byrum asked Lench,

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[2]In a separate action, Kaiser alleges that the Howard P. Foley Company (Foley), Fischbach & Moore, Inc. (Fischbach), and Roy M. Butcher Electric (Butcher) conspired to rig the bids on electrical work at the Kaiser plant. This antitrust claim is the subject of *Kaiser Cement v. Fischbach & Moore, Inc.*, No. 85-1846, in which summary judgment was granted for defendants.

[3]At the time of the bidding, Erwin was employed by Foley. Erwin left his position with Foley, and was subsequently called to testify before a grand jury investigating price-fixing in the electrical construction industry.

another Foley employee, what Foley would do and Lench replied that Foley intended to bid the job competitively. Lench wanted to keep his options, to submit either a competitive or a fixed bid, and "extract a chip" from Fred Byrum for some future job in return for "laying off" or submitting a "complementary" bid.[4]

Foley bid the project at $5,216,000. According to Erwin, Lench received a bid amount from Byrum of Fischbach on May 29, and submitted it along with the fabricated breakdown. On June 6, 1979, Erwin and Lench attended a pre-award meeting with Kaiser representatives. At the meeting it was apparent that Kaiser wanted to give the contract to Foley if Foley would reduce its costs. According to Erwin, he and Lench decided to underbid Fischbach. The next day Foley submitted a bid of $4,794,000. Kaiser did not respond to that bid. It instead issued revised blueprints and invited revised bids. To prevent Fischbach's learning of the underbidding, Lench and Erwin prepared two documents. First, they composed a revised proposal letter to Kaiser that contained a bid of $5,221,000, $5,000 over the initial bid, that could be read to Byrum. Second, they prepared an attachment to the letter, on plain white paper and unsigned, listing various deductions. By exercising the options in the attached letter, Kaiser could reduce the bid by $450,000. Kaiser chose to exercise options worth $420,000 and reduced the total cost to $4,801,000. Kaiser awarded the contract to Foley.

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[4]A "chip" is the favorable consideration that one would receive from a competing bidder in return for an agreement not to submit a bid ("laying off") or submitting a bid price which is, by agreement with the competing bidder, higher than the bid submitted by the competing bidder (a "complementary" bid).

Erwin stated that he participated in the destruction of documents requested by subpoena from the federal grand jury sitting in Washington, D.C., which was investigating illegal price-fixing in the electrical construction industry. Erwin testified that Lench told him to destroy whatever documents would incriminate Foley. He destroyed telephone statements, supplier invoices, and estimates on all projects bid by the Martinez office. Erwin created a fictitious document retention policy which would explain the nonexistence of the destroyed documents.

Erwin also created false documents. Erwin said he was asked to provide Foley's arbitration counsel, Mr. Bryan, with a copy of the original endsheet for the Kaiser bid.[5] Erwin created a document entitled "Recap of Final Prices" and told Bryan that it had been created two days after Foley received Notice to Proceed from Kaiser.[6] It reflected manipulations of the figures for payroll, insurance, taxes, equipment depreciation, equipment rental, gas, oil, supplies, and overhead.

Kaiser contracted with Foley to perform electrical construction services over a ten-month period for a contract price of about $4.8 million.[7] The contract work took 24 months to complete. Foley originally planned to ex-

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[5]Endsheets are bid summary sheets that accompany the bid files.

[6]Erwin states that this document was intended to mislead both Mr. Bryan and the arbitrators in determining the fee Foley was entitled to receive. This endsheet became Exhibit 7.

Lench's testimony in the arbitration contradicts Erwin. Lench maintained that EndSheet II (Recount of Final Prices), was created the day after he and Erwin met with Kaiser and agreed on the contract, June 7, 1979.

[7]The prime contract was to start in July of 1979 and be completed on May 31, 1980.

pend 67,000 manhours, but actually expended 216,000 manhours. Foley argues that Kaiser caused disruptions and delays which required extra work and resulted in increased costs to Foley. It was a multiple prime project, indicating that the owner, Kaiser Cement, had to coordinate the work of the prime contract. Because Kaiser was responsible for coordination of the work, Foley claims that the disruptions and delays constitute breach of the contract by Kaiser. Kaiser agreed to pay Foley $3.25 million above contract price in partial compensation for Foley's increased costs. When Kaiser refused to pay additional claims, Foley petitioned the Superior Court for Santa Clara County, for an order compelling arbitration and to foreclose a mechanics lien.[8]

On November 23, 1981, District Judge William W. Schwarzer, ordered serial arbitration, under the provisions of the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1982).[9] The arbitration hearings covered fourteen nonconsecutive days of testimony and produced over 1,800 pages of transcript and about 400 exhibits. In the arbitration Foley argued that Kaiser had breached the

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[8]Foley requested compensation for damages due to Kaiser's breach in the following categories:

1. Labor escalation
2. Labor disruption
3. Uncompensated pending change orders
4. Additional and extended overhead costs
5. Butcher Electric's subcontractor claim
6. Foley's claim for retention and approved change orders not paid
7. Financing costs
8. Attorneys' fees and claim preparation costs.

[9]Foley petitioned the state court to compel arbitration on June 22, 1981. The procedural history from June 22 until November 23, 1981, when Foley appeared in federal court, is unclear.

construction contract and claimed $1.3 million in damages. To support this claim, Foley introduced evidence on how the bids were prepared, how project negotiations took place, and how the original bid amount was calculated. Foley introduced testimony on the relationship between damage and wage escalation, expert testimony on accounting, and 80 accounting schedules, based on source documentation.

The arbitrators requested an independent audit of Foley's actual costs "in order to verify the actual cost to Foley to perform the work on this project."[10] An audit was performed by Coopers & Lybrand and on May 31, 1983, the arbitrators awarded Foley $3,786,194. The district court found that Foley's action was based on breach of contract and confirmed the award on August 5, 1983.

I *Judgment*

Kaiser appeals the district court's denial of its Rule 60(b) motion to set aside the judgment confirming the arbitration award. An order denying relief under Rule 60(b) is appealable, but the appeal brings up the correctness of the order only. It does not permit appellant to attack the arbitration award for error that could have been complained of on direct appeal.[11] Rule 60(b)(2) allows relief from a judgment or order because of newly

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[10]"The audit will be certified and will be limited to establishing the actual costs to Foley as they are recorded in the Foley project ledgers and files. The Arbitrators will adjust those costs for Workers' Compensation and self-owned equipment."

[11]The district court explained that: "Kaiser seeks to apply clauses (2) and (3) to the arbitration proceeding, but fails to address the effect of the intervening judgment confirming the award." (Opinion at 5). Kaiser must state grounds for setting aside the court's judgment before reaching the arbitration award.

discovered evidence which by due diligence could not have been discovered sooner. Under Fed.R.Civ.P. 60(b)(3), fraud or other misconduct of an adverse party also justifies setting aside a judgment. The court may also grant relief under Rule 60(b)(6) for any other reason justifying relief. This court reviews denial of a Rule 60(b) motion for abuse of discretion. *In re Burley,* 738 F.2d 981, 988 (9th Cir.1984); *Plotkin v. Pacific Telephone & Telegraph Co.,* 688 F.2d 1291, 1292 (9th Cir.1982); *United States v. Russell,* 578 F.2d 806, 807 (9th Cir.1978). The appellate court's function in reviewing denial of a Rule 60(b) motion is not to determine whether the court was substantially correct in entering the judgment from which relief is sought, but is limited to deciding whether the court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown. *Russell,* 578 F.2d at 807.

A motion brought under 60(b)(6) must be based on grounds other than those listed in the preceding clauses. *Corex Corp. v. United States,* 638 F.2d 119, 121 (9th Cir.1981). Clause 60(b)(6) is residual and "must be read as being exclusive of the preceding clauses." In addition, the clause is reserved for "extraordinary circumstances." *Id.; Martella v. Marine Cooks & Stewards Union,* 448 F.2d 729, 730 (9th Cir.1971), *cert. denied,* 405 U.S. 974, 92 S.Ct. 1191, 31 L.Ed.2d 248 (1972). Because Kaiser failed to allege "extraordinary circumstances" and relied exclusively upon its fraud and newly discovered evidence arguments, the district court held that Rule 60(b)(6) was not applicable.

Under Rule 60(b)(3), the moving party must establish by clear and convincing evidence that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving

party from fully and fairly presenting the case. *Bunch v. United States,* 680 F.2d 1271, 1283 (9th Cir.1982); *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir.1978). Kaiser failed to identify any fraud, misrepresentation or misconduct in the court proceedings. Fraud alleged in the arbitration does not render the judgment fraudulently obtained.

Kaiser also argues that the court made five errors which prevented it from fully and fairly presenting its case. The five alleged errors are (1) its ruling that Foley's alleged fraud and bid-rigging were not material, (2) its conclusion that Kaiser did not use due diligence in discovering evidence of fraud, (3) its refusal to allow Kaiser to depose Lench, (4) its consideration of "incompetent testimony of Foley's declarants", and (5) its failure to hold an evidentiary hearing. These errors do not constitute "extraordinary circumstances" under 60(b)(6) and do not otherwise justify setting aside the judgment confirming the award.

II *Award*

The United States Arbitration Act, 9 U.S.C. § 10(a) (1982), permits the vacation of an arbitration award, "[w]here the award was procured by corruption, fraud, or undue means." Section 12 of the Act provides that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." The arbitrators issued their decision on May 31, 1983, and Kaiser filed its original motion to vacate on June 24, 1983. The motion was denied on August 5, 1983 when the district court confirmed the arbitration award. Kaiser did not seek an appeal of the court's decision. Kaiser now attempts to revive the motion to vacate by

way of a Rule 60(b) motion with a claim of newly discovered evidence.

The federal Arbitration Act provides the exclusive grounds for challenging an arbitration award within its purview. *Corey v. New York Stock Exchange,* 691 F.2d 1205, 1212 (6th Cir.1982). "Once an arbitrator has rendered a decision the award is binding on the parties unless they challenge the underlying contract to arbitrate pursuant to section 2 or avail themselves of the review provisions of sections 10 and 11." *Id.* Otherwise, "[t]he three month notice requirement of section 12 for appeal of an award on section 10 or 11 grounds [would be] meaningless if a party to the arbitration proceeding [could] bring an independent action asserting such claims outside of the statutory time period provided for in section 12." *Id.* at 1213.

Kaiser's current motion seeking to vacate the arbitration award was filed August 3, 1984, approximately one year after the award was made. Thus, direct attack of the award pursuant to section 10 of the Arbitration Act is foreclosed. In addition, Kaiser may not now collaterally attack the award under the guise of a motion to set aside the judgment confirming the award.

Even if Kaiser's motion was timely, Kaiser fails to allege fraud which justifies vacation of the award. The Arbitration Act allows vacation of an award "where the award was procurred by corruption, fraud, or undue means." 9 U.S.C. § 10. Kaiser must show that the fraud was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. *Dogherra v. Safeway Stores, Inc.,* 679 F.2d 1293, 1297 (9th Cir.), *cert. denied,* 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982).

Kaiser stated that during the arbitration it suspected that Erwin had falsified documents.[12] Neglecting to subpoena Erwin, under these circumstances, vitiates its claim that the alleged fraud was not discoverable by due diligence. For the same reason, Erwin's statements do not constitute newly discovered evidence.[13] Newly discovered evidence does not justify vacation of an award. *Shearson Hayden Stone, Inc. v. Liang,* 653 F.2d 310, 313 (7th Cir. 1981). But even if newly discovered evidence did justify vacation of the award, Kaiser's failure to exercise due diligence and subpoena Erwin bars it from claiming this evidence to be new.

III *Entitlement To Attorney Fees*

The district court awarded Foley attorney fees incurred in opposing Kaiser's motion. The Kaiser-Foley contract provides that Kaiser is entitled to attorney fees

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[12]Patrick Duffy, Kaiser's arbitration counsel stated that "[d]uring the arbitration I suspected that [Exhibits 2 and 7] may have been tampered with and I voiced this concern to the arbitrators." In his opening statement, Kaiser's counsel told the arbitrators that the bid documents might be false and he would attempt to prove that they were. The court found that evidence was not newly discovered. "Kaiser filed its original motion to vacate the arbitration award fully aware of the allegedly fraudulent nature of these exhibits and the testimony given in support of them . . .".

[13]Kaiser argues that Erwin's sudden willingness to testify, a year after the arbitration, constitutes new evidence which merits vacation of the award. Erwin was granted immunity when subpoenaed by a federal grand jury investigating price-fixing in the electrical construction industry. Pursuant to the grant of immunity, Erwin testified before the grand jury for four days. He testified to the agreement to fix prices on the electrical work in the Kaiser project, the withholding and destruction of documents in response to a subpoena from another federal grand jury, and the creation of false documents which were ultimately used in the Kaiser arbitration.

in any action to enforce the contract.[14] The contract also provides that it is to be interpreted in accordance with California law. California Civil Code, section 1717 makes the contract provision for attorney fees applicable to Foley also, if Kaiser's motion constitutes an action "on the contract."[15]

Kaiser argues that because its motion to vacate was based upon Fed.R.Civ.P. 60(b), it was based on a right granted by federal procedure, and state substantive law, including section 1717, does not apply. Kaiser bases its argument on *In re Johnson,* 756 F.2d 738 (9th Cir.), *cert. denied,* — U.S. —, 106 S.Ct. 88, 88 L.Ed.2d 72 (1985), in which this court held that when the state law governing

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[14]Article 28 of the Permanente project contract between Kaiser and Foley provided that, in certain circumstances, Kaiser could recover its attorney fees if forced to litigate against Foley in connection with a dispute arising out of the contract.

[15]California Civil Code § 1717 provides:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of the contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Section 1717 is calculated to provide mutuality of remedy and eliminate one-sided attorney fees clauses which would otherwise be used to force settlements of unmeritorious claims. *Berge v. International Harvester Co.,* 142 Cal.App.3d 152, 164, 190 Cal.Rptr. 815, 824 (1983). "This protection is available to the consumer even if he succeeds in defending himself on the theory that there was no enforceable contract to begin with. '[A]s long as the action here involved a contract it was "on a contract" and within Civil Code, section 1717.' " *Id.* at 164, 190 Cal.Rptr. 815 (quoting *Care Construction, Inc. v. Century Convalescent Centers, Inc.,* 54 Cal.App.3d 701, 706, 126 Cal.Rptr. 761, 764 (1976)).

contractual relationship is not considered in the federal litigation, then the action is not one "on the contract" to which state law should be applied. The Johnsons purchased property from the Righettis under a deed of trust. The Johnsons filed for reorganization under Chapter 11, and the bankruptcy court stayed the Righettis from foreclosing the deed of trust. The Righettis filed a request for relief from the stay, and the Johnsons incurred attorney fees in opposing the motion. The promissory note executed by the Johnsons and accompanying the deed of trust provided that the Johnsons would reimburse the Righettis for any attorney fees incurred in enforcing those documents. The bankruptcy court awarded the Johnsons their attorney fees under Cal.Civ.Code, section 1717 after denying the motion for relief.

This court held that stay proceedings are not proceedings "on a contract" even though the Righettis sought to foreclose a deed of trust because substantive issues regarding the underlying contract are not involved in bankruptcy stay litigation. *Id.* at 740; *see In re Coast Trading Co.,* 744 F.2d 686, 693 (9th Cir. 1984) ("the question of the applicability of the bankruptcy laws to particular contracts is not a question of the enforceability of the contract but rather involves a unique, separate area of federal law").[16]

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[16]This court has given the requirement that an action be "on the contract" a liberal scope. While a tort action for fraud arising out of a contract is not an action on a contract, intentional misrepresentation may render a contract void or provide a basis for rescission or reformation. An action to avoid, reform or rescind a contract due to intentional misrepresentations is an action on a contract. *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.,* 121 Cal. App.3d 447, 461, 176 Cal.Rptr. 546, 554 (1981).

In this case, Kaiser moved to compel arbitration pursuant to its contract with Foley. The arbitration concerned Foley's entitlement to payment for services rendered pursuant to the contract. That arbitration resulted in an award. Kaiser was contractually bound by the award unless grounds existed for vacation of the award under 9 U.S.C. § 10. Kaiser did challenge the award as procured by fraud. Kaiser's motion to vacate the award and set aside the judgment confirming the award arose directly out of the contract, as did Foley's opposition to Kaiser's motion. The Kaiser-Foley contract provides that Kaiser is entitled to attorney fees in actions to enforce the contract. We conclude that Kaiser's motion is an action based on the contract and therefore the contractual provision for attorney fees applies. Unlike *Johnson,* the underlying contract between the parties is not collateral to the proceedings but plays an integral part in defining the rights of the parties by setting forth arbitration as the agreed means of dispute resolution.

Kaiser argues that its motion was not "on the contract" because Kaiser's defense was that the arbitration award was procured by fraud. This argument is meritless. As

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> Here, since the language of the deed of trust did not limit the situation in which attorney's fees would be recoverable to any particular form of action involving the contract, the suit resulting in a judgment invalidating the purported agreement between the parties for lack of consideration and alternatively for intentional misrepresentation was an action "on the contract" which permitted an award of attorney fees under section 1717.

Star Pacific Investments, 176 Cal.Rptr. at 555. Under California law, "where claims and counterclaims arise in connection with a contract containing an attorneys' fees provision, the party who obtains a favorable judgment is deemed to be the prevailing party even though he did not successfully obtain all the relief which he sought in the action." *Matter of Sparkman,* 703 F.2d 1097, 1100 (9th Cir. 1983).

previously stated, Kaiser was attempting to avoid that part of the contract binding Kaiser to resolution of its dispute with Foley by way of arbitration. The fact that it attempted to do this by way of a fraud defense does not change the nature of the action.

Looking at the Kaiser-Foley contract, it provides that it is to be interpreted in accordance with California law. Consequently, we look to California law, specifically Cal.Civ.Code, section 1717, in interpreting the attorney fee provision. Because section 1717 makes the attorney fee provision applicable to Foley, we find that the district court was correct in awarding Foley attorney fees.

IV *Attorney Fee Documentation*

A district court's award of attorney fees is reviewed for abuse of discretion. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

Foley moved for attorney fees in the amount of $259,820.11, based upon Article 28 of the construction contract and section 1717(a) of the California Civil Code. In support of its motion for fees, Foley submitted the affidavits of Sims and Bryan and the Declaration of Dillon. These documents complied with Local Rule 270-2.[17] Foley's award of attorney fees compensates for the

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[17]Rule 270-2 provides:

Unless otherwise ordered, the application [for attorneys' fees] shall be supported by declarations or affidavits containing the following information:

(a) A statement that counsel have met and conferred or that the applying attorney has made a good faith effort to arrange such a conference;

(b) A statement of the services rendered by each person for whose services fees are claimed together with a summary of the time spent

services of Joe Sims, Haradon Dillon, and Carroll Bryan. Kaiser argues that the district court abused its discretion in granting Foley's application because the Sims and Dillon statements were not sufficiently detailed. Kaiser alleges that Foley did not establish that the Dillon and Sims services (1) were reasonably necessary to the legal representation of Foley, (2) were reasonable in hours expended, and (3) that the billing rate was customary in the area. Kaiser attacks the award of attorney fees for Bryan's services because the services rendered on August 23rd and 24th were used to prepare Bryan's deposition as a fact witness, not services rendered in his capacity as attorney. Also, Kaiser opposes Bryan's claim of attorney fees for 13 hours on September 12th because that constituted time necessary to give a deposition.

In its order of February 14th, the district court awarded Foley $207,700 in attorney fees and costs.[18] In calculating reasonable attorney fees the court must consider the following factors: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill necessary to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or circum-

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by each person, and a statement describing the manner in which time records were maintained. Depending on the circumstances, the judge may require submission of the abstract of the contemporary time records or the production of these records for inspection, including in camera inspection, as the judge deems appropriate;

(c) A brief description of relevant qualifications and experience and a statement of the customary hourly charges of each such person or of comparable prevailing hourly rates or other indication of value of the services.

[18]Breakdown of fees and costs awarded:

stances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relations with the client, and (12) awards in similar cases. *Kerr,* 526 F.2d at 69-70. A complete failure to consider these guidelines constitutes an abuse of discretion. *Martinez v. Idaho First National Bank,* 755 F.2d 1376, 1378 (9th Cir. 1985); *Kerr,* 526 F.2d at 70. Consideration of only three factors and conclusion that the remaining nine are not relevant is not an abuse of discretion.

Kaiser argues that Foley actually received everything it asked for and that somehow implies an inadequate inquiry by the district court. Foley originally claimed $259,820.11 but $35,061.16 was for a bonus. The bonus claim was not supported in the application, and was not addressed by the court in its order awarding attorney fees. Apart from the bonus claim, Foley claimed $207,952.66. Foley received $207,700.

The court's award of attorney fees was supported by affidavits and exhibits that included contemporaneous time records maintained by the law firms involved. The exhibits and affidavits disclosed the hours billed, the nature of the professional services rendered, and the customary hourly rate of each attorney. Each attorney

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	Fees	Costs
Jones, Day (Sims), Lead counsel	$119,581	$21,399
McInerney & Dillon (Dillon), Lead counsel	44,280	10,967
Taylor & Bryan (Bryan), Arbitration counsel	8,778	2,695
Totals	$172,639	$35,061

Fees Total	$172,639
Costs Total	$ 35,061
Grand Total	$207,700

specified his professional credentials. Each firm submitted a description of the services performed, by whom they were performed, and that individual's hourly rate at the time of performance. In some instances the time devoted to each service was reflected in a contemporaneous record. Account statements reflected both attorney's fees and costs, such as travel expenses.

The district court meticulously considered the relevant factors. The court found that a large amount of money, $3.8 million, was at stake. The work was complicated and time consuming. Kaiser raised numerous legal and factual issues in its motion to vacate. Foley's counsel was required to work with a voluminous record of the arbitration hearing and to do considerable legal research. Foley's counsel worked under time pressure. Counsel for Foley were of the "highest quality," experienced and competent.

The court examined the affidavits and exhibits submitted and held that the time charged was reasonably expended, that there was no duplication of effort and that Foley's retention of three firms was reasonable. Each firm served Foley in a different respect. Jones, Day, Reavis & Pogue served as lead counsel because it had represented Foley in related litigation and was familiar with the issues. McInerney & Dillon had represented Foley in connection with the arbitration and served as local counsel. Taylor & Bryan brought to Foley its familiarity with the arbitration. The court held that the hourly rates charged were reasonable in light of the experience and standing of the lawyers involved and the nature and circumstances of the work.

The court's analysis was thorough and thoughtful. It reflected consideration of the relevant factors. The court

did not abuse its discretion in granting Foley $207,700 in attorney fees.

Under Cal.Civ.Code, section 1717, Foley is entitled to attorney fees incurred in defending this appeal. If Foley makes application to this court within 30 days of this order, it will be awarded its fees. The award is subject to reconsideration if opposition to the application is filed within ten days of application.

The decision of the district court is AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
LAFARGE CONSEILS ET ETUDES, S.A.,
Plaintiff,
v.
KAISER CEMENT & GYPSUM CORP.,
Defendant.
AND RELATED CROSS-ACTIONS
NO. C-81-2263-WWS
LAFARGE CONSULTANTS LTD.,
Plaintiff,
v.
KAISER CEMENT & GYPSUM CORP.,
Defendant.
AND RELATED CROSS-ACTIONS
NO. C-81-2264-WWS

MEMORANDUM OF OPINION AND ORDER

Kaiser Cement Corporation, sued here as Kaiser Cement & Gypsum Corporation ("Kaiser") has moved to set aside the judgment of this Court in favor of Howard P. Foley Company ("Foley") confirming the arbitration award and to vacate that award. Kaiser contends that newly discovered evidence of fraud and misconduct by Foley justify relief from the judgment pursuant to Federal Rules of Civil Procedure 60(b) and 11 and the supervisory powers of the court.

FACTS

In 1979 Kaiser and Foley entered into a contract for the modernization of Kaiser's cement plant in Permanente, California. After two bids and a subsequent round of direct negotiations, Kaiser awarded Foley a contract on July 6, 1979, to perform electrical construc-

tion services. The project was not completed until July, 1981, fourteen months later than originally scheduled. The contractors claimed additional compensation said to have been caused by delays and disruptions but Kaiser denied liability.

Serial arbitration of the disputes between Kaiser and the contractors was ordered by this Court on November 23, 1981, pursuant to the United States Arbitration Act, 9 U.S.C. § 10. The arbitration hearing on Foley's claims began on February 17, 1983, and concluded on March 26, 1983. After the hearings were concluded and prior to reaching a decision, the arbitrators requested an independent audit of Foley's costs by the accounting firm of Coopers & Lybrand. The Coopers & Lybrand audit was submitted to the arbitrators on May 31, 1983; it found that Foley's project costs through July 31, 1982, exclusive of legal expenses and claim preparation fees, totalled $9,511,899 and that the total amount paid by Kaiser to Foley was $8,064,041. After receiving this report, the arbitrators issued their decision, awarding Foley $3,786,194.

Kaiser subsequently sought an order from this Court vacating the arbitrators' award. Kaiser argued: (1) that an appropriate audit to determine Foley's costs had not been performed as required by the contract; (2) that evidence of settlement discussions had been erroneously introduced at the arbitration proceedings; and (3) that Kaiser was entitled to pursue an antitrust claim as a counter-claim. Foley opposed Kaiser's motion and filed its own motion to confirm the arbitration award. On August 5, 1983, the Court rejected Kaiser's arguments, granted Foley's motion to confirm and entered judgment thereon.

Kaiser now moves to have this judgment set aside and the arbitration award vacated pursuant to Fed. R. Civ. P. 60(b)(2), 60(b)(3), 60(b)(6), and 11, and the court's supervisory power. The principal evidence on which Kaiser relies in support of its motion is the declaration of Rick Erwin, a former Foley employee.[1] Erwin's declaration describes at length an alleged bid rigging scheme between Foley and a competitor, Fischbach & Moore, at a time when Kaiser sought bids on its Permanente project. Kaiser ultimately awarded the contract to Foley, although Foley was the high bidder, after Kaiser had negotiated certain reductions in the contract price with Foley. Erwin Decl., pp. 6-18.

With regard to the arbitration proceeding, Erwin asserts fraudulent conduct by Foley in the following respects:

1. Foley's fabrication and submission to the arbitration panel of a document (Exhibit 2 in the arbitration proceeding) which Foley and its representative, Frank Lench, falsely represented to be the original bid sheet prepared in May 1979. Erwin Decl. at ¶¶ 25, 26.

2. Foley's fabrication and submission to the arbitration panel of a document (Exhibit 7 in the arbitration proceeding) which Foley and Lench represented to be a "summary end sheet" created just after Foley won the contract in July 1979, and which reflected Foley's costs and winning bid price.[2] Erwin Decl. at ¶¶ 23, 24.

3. The perjurious testimony of Frank Lench regarding Exhibits 2 and 7. *Id.* at ¶¶ 24, 26.

4. The perjurious testimony of Frank Lench regarding the bid preparation and calculation process

in which Mr. Lench never participated. *Id.* at ¶¶ 23, 24.

5. Foley's fabrication of a fictitious computer printout purporting to summarize and represent actual costs booked by Foley as of January 31, 1983, which was provided to Foley's designated arbitrator on an ex parte basis. *Id.* at ¶ 28.

6. The intentional destruction and withholding of documents and records responsive to the subpoena of a Washington, D.C. grand jury. Some of these documents, consisting of supplier invoices, cost estimates and bid preparation materials were relevant to the Permanente project. *Id.* at ¶ 22.

DISCUSSION

Kaiser relies on Fed. R. Civ. P. 60 in moving to set aside the judgment of this Court.[3] Its reliance on clause (6) of the Rule is misplaced. That clause covers "any other reason justifying relief from the operation of judgment." Fed. R. Civ. P. 60(b)(6). It is reserved, however, for "extraordinary circumstances." *Washington v. Penwell,* 700 F.2d 570, 573 (9th Cir. 1983); *Corex Corp. v. United States,* 638 F.2d 119, 121 (9th Cir. 1981). Kaiser has alleged no extraordinary circumstances here. Instead, it relies solely on alleged acts of "fraud, misrepresentation and misconduct" covered by clause (3) and newly discovered evidence covered by clause (2). Clause 6, being a residual clause, must be read as being exclusive of the preceding clauses, not cumulative or overlapping, and a motion brought under it must be on grounds other than those listed in the preceding clauses.[4] See *Klapprott v. United States,* 335 U.S. 601, 614-15 (1949); *Corex Corp. v. United States,* 638 F.2d at 121.

Kaiser seeks to apply clauses (2) and (3) to the arbitration proceeding, but fails to address the effect of the intervening judgment confirming the award. Unless Kaiser can state grounds for vacating that judgment, its attack does not reach the arbitration award which stands confirmed. Kaiser ignores that issue in its papers, opting instead for irrelevant rhetoric. *See* Kaiser's Memorandum at 12-13. It fails to demonstrate the existence of any "newly discovered" evidence or "fraud, misrepresentation or other misconduct" having had any impact on the proceedings in this Court. In oral argument, Kaiser contended that the alleged fraud perpetrated in the arbitration proceeding was implicitly carried forward to the request to confirm the judgment. Trans. of Proceeding, Sept. 14, 1984, at 32. Even if this argument is accepted, however, Kaiser's showing is insufficient to warrant the relief sought.

A. Setting Aside the Judgment

1. Rule 60(b)(2)

Rule 60(b)(2) applies to evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). Further, the evidence must be of such material and controlling nature that it probably would have changed the outcome of the case. 7 *Moore's Fed. Practice* ¶ 60.23[4]. See also *United States v. Bransen,* 142 F.2d 232, 235 (9th Cir. 1944).

a. Due Diligence

Kaiser asserts that the "most critical and sole pieces of documentary evidence" relied upon by Foley during the arbitration proceedings were the bid and summary estimates sheets, Exhibits 2 and 7. Kaiser filed its original motion to vacate the arbitration award fully aware of the

allegedly fraudulent nature of these exhibits and the testimony given in support of them. The alleged fraud was raised several times during the arbitration proceeding. Patrick Duffy, the attorney who represented Kaiser in the arbitration, acknowledges in his declaration submitted with Kaiser's motion that "[d]uring the arbitration I suspected that [Exhibits 2 and 7] may have been tampered with and I voiced this concern to the arbitrators." Duffy Decl., Aug. 2, 1984, at ¶ 5. Duffy's opening statement expressly argued that the exhibits were falsified. Arb. Trans. at 117. The accuracy of the exhibits was further challenged in the cross-examination of Frank Lench, Foley's Martinez branch manager. *Id.* at 184-85.

The only "newly-discovered" evidence concerning Exhibits 2 and 7 is the testimony of Erwin; Kaiser argues that Erwin's testimony conclusively establishes the falsity of these exhibits. Kaiser was told during the arbitration that Erwin is the person who prepared Exhibits 2 and 7. Duffy complained several times during the arbitration of Erwin's failure to appear as a witness, a complaint renewed by Kaiser. Duffy Decl., Aug. 2, 1984. at ¶ 3. But the suggestion that Kaiser is excused from the "due diligence" requirement because it had "no access . . . to any discovery" in the arbitration proceeding is meritless. Trans. of Proceeding, Sept. 14, 1984, at 7. Having been on notice that Erwin's testimony may be relevant, Kaiser could have requested the arbitrators to compel his attendance by exercising their powers pursuant to the Arbitration Act, 9 U.S.C. § 7. Its failure to do so bars it from now claiming this evidence to be newly-discovered.

b. Materiality

Kaiser moreover has failed to demonstrate that Erwin's testimony is of such a material and controlling nature

that it would probably have changed the result of the arbitration and the judgment of this Court. Kaiser argues that Exhibits 2 and 7 "must have been considered and utilized by the arbitrators in their decision." Kaiser's Memorandum at 11. Kaiser asserts that the most significant part of Foley's damage claim was based on labor disruption and additional and extended jobsite overhead, and that the labor disruption claim was based on total manhours worked, less certain adjustments. The principal adjustment was the estimated hours contained in Exhibits 2 and 7. Duffy Decl. Exhibit A, September 8, 1984. The additional and extended jobsite overhead claim is based on actual costs reduced by estimated costs, plus payments made on change orders. *Id.* As to the allegedly fraudulent computer printout, Kaiser asserts that the "nature of the information contained in this document and the purpose for which it was fabricated conclusively establishes its materiality to the arbitration." Kaiser Reply Memorandum at 18. The documents allegedly destroyed by Erwin in 1982 are described as "material and relevant to the Permanente project." Kaiser's Memorandum at 10.

Erwin's declaration, however, does not challenge the accuracy of Foley's manhour estimate in Exhibits 2 and 7. The declaration states that "[t]he only numbers . . . based on Foley's actual records" that he used in preparation of the allegedly falsified end sheet were the total estimated manhours and material costs. Erwin Decl., Aug. 5, 1984, at ¶ 12. Foley asserts that the remaining information in Exhibits 2 and 7 did not relate to the award made by the arbitration panel.

The testimony of Erwin raises issues which are tangential at best. Even accepting Kaiser's assertion that Foley's damage claim was based on total costs less

estimated costs, applying this formula does not lead to the arbitrators' final award. The arbitration panel awarded Foley $3,455,206 on its delay and disruption claim. The arbitrators gave no reason for their award, nor are they required to do so. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *Wilko v. Swann*, 346 U.S. 427, 436 (1953). While it is not self-evident how the arbitrators determined the amount of the award, Foley asserts that the award was determined by calculating the amount needed to compensate Foley for its total costs plus a percentage for overhead and profit. Kaiser has also acknowledged that this was the basis of calculation. In his Declaration in Opposition to the Petition to Confirm the Arbitration Award, June 23, 1983, at 12 n2, Duffy stated that "cost plus 15% was the award." In the hearing on the motion to confirm, Duffy described the arbitrators' calculation by stating "[W]hat they apparently did was simply to take the total costs on the job and put some ad-ons [sic] around it and made that an award." Trans. of Proceeding, Aug. 5, 1983, at 4. In the subsequent Midwest Conveyor arbitration arising out of the same project, Kaiser asserted an indemnity claim for a portion of the arbitration award to Foley; it there described the Foley award as being based on Foley's costs, plus 15% overhead and profit. Bryan Decl., Aug. 3, 1984, at ¶ 9.

The evidence of total costs before the panel was the audit report prepared by Coopers & Lybrand. A letter from Frank Anderson, the neutral arbitrator, described the nature of this audit:

> The audit will be certified and will be limited to establishing the actual costs to Foley as they are recorded in the Foley project ledgers and files. The arbitrators will adjust these costs for Worker's Com-

pensation and self-owned equipment, which two costs are not in the Foley records.

Letter from Frank Anderson to Patrick Duffy and Carroll Bryan, April 5, 1983.

Kaiser's attack on the audit procedures was raised on Foley's motion to confirm the award and rejected by the Court.

Because of the lack of any demonstrated connection between the estimates contained in Exhibits 2 and 7 and the final arbitration award, Erwin's testimony regarding Exhibits 2 and 7 has not been shown to be material. As for the computer printout allegedly given to Foley's arbitrator on an ex parte basis, it is immaterial since it was never received into evidence in the arbitration. Similarly, the charge of alleged document destruction is immaterial. Kaiser has not shown that destroyed documents were sought by the arbitration panel or were otherwise material.

2. Rule 60(b)(3) — Fraud

To be entitled to relief under Rule 60(b)(3), a party must prove (1) by clear and convincing evidence that the judgment was obtained by fraud, misrepresentation, or other misconduct; and (2) that the conduct complained of prevented it from fully and fairly presenting its case or defense. *Bunch v. United States,* 680 F.2d 1271, 1283 (9th Cir. 1982); *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir. 1979).

a. Clear and Convincing Evidence

Kaiser's claim of fraud rests entirely on the testimony of Erwin, a former Foley employee who was granted immunity in exchange for grand jury testimony and who

is presently employed by Kaiser as a consultant in its antitrust action against Foley. Foley's papers dispute Erwin's statements in most respects. The issue raised is at best one of credibility, and there is no more reason to believe a disgruntled ex-employee than Foley's declarants. Certainly there is no clear and convincing evidence of fraud.

b. Full and Fair Presentation of Case

As stated, Kaiser raised in the arbitration the allegedly fraudulent nature of Exhibits 2 and 7 and the perjurious testimony concerning them. The claim of fraud was implicitly rejected by the arbitration award. In the course of the arbitration, the panel heard fourteen days of testimony from witnesses, including certified public accountants from each side. The arbitration produced over 1800 pages of transcript and approximately 400 exhibits. During the proceedings, the panel was alerted several times to the possible falsification of Exhibits 2 and 7. In addition to stating explicitly that the exhibits were falsified, Kaiser attempted to prove falsification by comparing the manhour figures contained in Exhibit 7 to the figures reflected in the minutes of the June 6, 1979, pre-award meeting. It sought to identify internal inconsistencies between Exhibits 2 and 7. It vigorously cross-examined Frank Lench in an attempt to discredit his direct testimony regarding the exhibits. It urged the arbitrators to draw adverse inferences from the failure of Erwin, the person who prepared Exhibits 2 and 7, to appear before the panel. Finally, in his closing argument to the panel, Duffy stated that "our cross-examination has been thorough and affective [sic] because their witnesses were neither accurate nor truthful." Arb. Trans. at 1816.

It is obvious that the arbitration panel reached its final decision cognizant of possible fraud, misrepresentation and misconduct in the proceedings. Coopers & Lybrand, in a letter to Frank Anderson explaining its accounting procedures, stated that "in making our examination, we will be aware of the possibility that illegal acts may have occurred." Exhibit G, Foley's Motion to Confirm, August 5, 1983. Les Weinstein, attorney for Kaiser, relates a conversation with Frank Anderson, the neutral arbitrator, on August 8, 1984. Anderson told Weinstein "that he doubted [Kaiser's motion] would change his mind because he was an experienced construction contract arbitrator and that in his experience witnesses frequently testify falsely or stretched the truth." Weinstein Decl. at ¶ 3. Later, after reading Kaiser's motion, Anderson told Weinstein that "he was not shocked because he had been troubled by Mr. Lench's testimony during the course of the arbitration." *Id.* at ¶ 6. Significantly, Anderson stated that "he was not convinced that his decision would be different." *Id.* When asked by Weinstein about Erwin's testimony as to Exhibits 2 and 7, Anderson told Weinstein that if these statements are true "[w]e were literally taken down the primrose path." *Id.* at ¶ 7. But when asked whether this information would have caused him to deny Foley an award, Anderson could only say, "that is possible." *Id.* The fraudulent nature of the exhibits and testimony was again argued before this Court in Kaiser's motion to vacate the award. Having considered the evidence before it, however, the Court concluded:

> These arbitrators are competent and experienced, and there is a presumption of validity that attaches to their findings. And I have heard nothing here that would justify my going behind the award and setting it aside. It strikes me as being professionally done, and based on a hearing in which all of the issues that

> are raised now were before the arbitrators. Kaiser had full opportunity to cross-examine the witnesses and bring in its own proof . . . supporting [its] contention.
>
> Trans. of Proceeding, Aug. 5, 1983, at 20.

Thus, Kaiser has failed to prove by clear and convincing evidence that the judgment confirming the arbitration award was obtained by fraud, misrepresentation or misconduct, let alone that it was prevented from fully and fairly presenting its case.

B. Vacating the Arbitration Award

Even if the Court were to reach the merits of the motion to vacate the arbitration award, it would have to be denied. It is well settled that courts must be slow to vacate an arbitration award on the ground of fraud in order to protect the finality of arbitration decisions. *Dougherra v. Safeway Stores,* 679 F.2d 1293, 1297 (9th Cir.), *cert. denied,* 459 U.S. 990 (1982). A party seeking to vacate an arbitration award on the basis of fraud must show that: (1) the fraud must not have been discoverable by the exercise of due diligence prior to the arbitration; (2) the fraud must materially relate to an issue in the arbitration; and (3) the fraud must be established by clear and convincing evidence. *Id.* All of these factors have been previously discussed; Kaiser has failed to establish any of them.

Moreover, Kaiser's motion to vacate the award is untimely under the Arbitration Act, 9 U.S.C. § 12, requiring that such motions be brought within three months of the date of the award. Kaiser filed its original motion to vacate the arbitration award on June 24, 1983, specifically addressing the fraudulent nature of documents and testimony. Duffy Decl., June 24, 1983. That motion was denied

by the Court's order and judgment of August 5, 1983, and any attempt to resurrect it is untimely. Kaiser's claim of "newly-discovered" evidence is of no avail. Because of the concern that "piecemeal or staggered" submission of evidence would destroy the effectiveness of arbitration as a speedy and efficient forum for dispute resolution, the discovery of new evidence is generally not ground for vacating an arbitration award. See *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.* 442 F.2d 1234, 1238 (D.C.Cir. 1971) (labor union not entitled to re-open arbitration on ground that witness who refused to testify at first proceeding was now willing to testify.); see also *Shearson Hayden Stone, Inc. v. Liang,* 653 F.2d 310, 313 (7th Cir. 1981) ("The Arbitration Act does not allow vacation of an award for new evidence.")

C. Supervisory Powers of the Court and Rule 11

Because Kaiser cannot show that it is entitled to relief under Rule 60, it is not entitled to relief under the court's "inherent supervisory power." If this avenue were available, Rule 60 and its evidentiary and legal standards would be superfluous. As for Kaiser's argument under Rule 11, it is at best frivolous.

For the reasons stated, Kaiser's motion to set aside the judgment of this Court enforcing the arbitration award and to vacate that award is denied.

IT IS SO ORDERED.

DATED: October 23, 1984

WILLIAM W. SCHWARZER

WILLIAM W. SCHWARZER
United States District Judge

FOOTNOTES

[1] Erwin is a former vice-president and general manager of Foley. Before leaving Foley in October, 1983, Erwin was responsible for the day-to-day operations and administration of Foley's Martinez, California, office, including the preparation of all bids and estimates. He is described by Kaiser as a "primary participant in the fraud and misconduct herein alleged." In March, 1984 Erwin was subpoenaed as a witness by a San Francisco grand jury investigating bid rigging in the electrical construction industry. After a grant of immunity, he testified to the fraudulent conduct described in his declaration. Since July, 1984, Erwin has been a consultant to Kaiser in its pending antitrust action against Foley.

[2] Erwin describes the purpose for his alleged fabrication of Exhibits 2 and 7:

> [The document] contained cost information which was inflated . . . by the fact that the bid amount was substantially higher than it would have been in a truly competitive bid. Cost categories . . . were inflated. These manipulations were designed to reduce or understate the margin or fee (the difference between Foley's direct costs and selling price) by increasing costs so that the margin would appear to be more reasonable and be used as a guide by the arbitrators in determining the margin or fee Foley was entitled to receive as part of its claim.

Erwin Decl. at ¶ 23.

[3] Rule 60(b) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment . . . for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment . . . was entered. . . ."

[4] Kaiser also has no basis for an independent action under the savings clause of Rule 60(b). Under *United States v. Throckmorton*, 98 U.S. 61 (1878), an independent action may be maintained only for

extrinsic, not intrinsic fraud. *Wood v. McEwen,* 644 F.2d 797, 801 (9th Cir. 1981); *Independence Lead Mines Co. v. Kingsbury,* 175 F.2d 983, 985 (9th Cir. 1949). *Throckmorton* cites "fraudulent instruments" and "perjured evidence" as examples of intrinsic fraud and states that "the doctrine is . . . well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. . . . " *Id.* at 66.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 19, 1986, I served the within Petition for a Writ of Certiorari in re: "Kaiser Cement Corporation vs. Fischbach & Moore Inc. and the Howard P. Foley Co." in the United States Supreme Court October Term 1986;

on the parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 19, 1986, at Los Angeles, California

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CE CE MEDINA

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KAISER CEMENT & GYPSUM CORPORATION,

Petitioner,

—v.—

FISCHBACH & MOORE, INC. and THE HOWARD P. FOLEY CO.,

Respondents.

BRIEF OF RESPONDENT FISCHBACH & MOORE, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower courts correctly conclude, based on the totality of the circumstances and the record, that petitioner had failed to show the existence of a genuine issue for trial on the question whether respondents' alleged bidrigging was the proximate cause of any injury to petitioner, in light of the fact that the price actually paid by petitioner was based on an arbitration award that was not affected by any alleged bidrigging?*

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* Pursuant to Rule 28.1 of this Court, Respondent Fischbach and Moore, Inc. states that it is a wholly owned subsidiary of Fischbach Corporation. The only other subsidiary of Fischbach Corporation (other than wholly owned subsidiaries) is Fischbach and Moore of Canada, Ltd. All of the subsidiaries of Fischbach and Moore, Inc. are wholly owned. Neither Fischbach Corporation nor Fischbach and Moore, Inc. have any affiliates.

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STATEMENT

In 1979, petitioner Kaiser Cement & Gypsum Corporation ("Kaiser") sought bids for electrical construction work at its Permanente, California cement plant. Three companies submitted bids, including respondents Fischbach and Moore, Inc. ("Fischbach") and The Howard P. Foley Company ("Foley").[1] Following negotiations between Kaiser and Foley, Kaiser awarded the contract to Foley.

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1 On May 15, 1986, The Howard P. Foley Company and various affiliated entities filed for protection from creditors under Chapter XI of the Bankruptcy Act in the U.S. Bankruptcy Court for the Eastern District of Virginia, Docket No. 86-00874A.

The contract provided for Foley to complete the electrical construction work within a ten and one-half month period. Kaiser assumed the responsibility of coordinating the electrical construction work being done at the site. As a result of Kaiser's failure adequately to perform its obligation to coordinate the various contractors, Foley required twenty-four months to complete the work. As the court below noted, "Foley anticipated expending 67,000 manhours but actually used 216,000." (Pet. App. A-2-3).

The contract provided for total payments to Foley of approximately $4,800,000; Kaiser, in fact, paid Foley that amount plus an additional $3,260,000 during the course of the contract "to compensate [Foley] for numerous change orders." (Pet. App. B-1). Nonetheless, Foley's actual costs exceeded the amounts it had received and so it sought arbitration pursuant to the terms of the contract. On November 23, 1981, Judge William D. Schwarzer of the United States District Court for the Northern District of California ordered that matter as well as various related matters to be arbitrated.

The arbitrators held fourteen days of hearings. Following the close of evidence, "the arbitrators requested an audit by Coopers & Lybrand in order to establish the actual costs to Foley as they were recorded in the Foley project ledgers and files." (Pet. App. B-2). On May 31, 1983, Coopers & Lybrand submitted its audit report to the arbitrators, finding that Foley's costs totalled $9,511,899 and that the total paid by Kaiser to Foley was $8,064,041. (Pet. App. D-2). That same day the arbitrators issued their decision awarding Foley $3,786,194 additional compensation. The award was based on Foley's actual costs, plus 15 percent for overhead and profit.

Foley moved the district court to confirm the award. In his Declaration in Opposition to the Petition to Confirm the Arbitration Award, Kaiser's counsel, Mr. Duffy, stated that "cost plus 15% was the award."[2] Subsequently at the hearing

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2 In the arbitration, Kaiser's own expert calculated his "correct" bid by using estimated cost-plus 15 percent for overhead and profit. (CR

on the motion to confirm, Duffy advised the court that the arbitrator's calculation was made "apparently . . . simply to take the total costs on the job and put some add-ons around it and made that award." (Pet. App. D-8).[3] Kaiser argued that the audit was improperly performed and that the arbitrators had erroneously considered certain evidence. Judge Schwarzer rejected these arguments and confirmed the award on August 5, 1983; no appeal of the district court's decision was taken by Kaiser. (Pet. App. C-9).

On August 2, 1983, Kaiser filed the present action. It alleged that the bids were rigged and that the contract price was inflated.[4] Kaiser subsequently filed a motion with Judge Schwarzer requesting the district court to set aside its judgment and vacate the arbitration award pursuant to Fed. R. Civ. P. 60(b). That motion was denied on October 23, 1984, in an opinion set out in Appendix D to the Petition. The court concluded that the purportedly newly discovered evidence did not meet the standard of Rule 60(b). In so holding, the court concluded that Kaiser failed to demonstrate that the evidence was of material and controlling nature. The purported evi-

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152: Exhibit 7) ("CR" refers to the District Court Clerk's Docket Control Number and was used as the record reference in the court of appeals.)

3 The Coopers & Lybrand audit did not provide for amounts to cover workmen's compensation and self-owned equipment expenses. The arbitrators stated that they would "adjust those costs [as determined by Coopers & Lybrand] for Workers' Compensation and self-owned equipment, which two costs are not in the Foley records." (CR 152: Exhibit 8). Thus, the arbitrators apparently determined these two costs to total $792,967 and then added that amount to the total of direct job costs as determined by Coopers & Lybrand to yield total costs to Foley of $10,304,866. They then added 15 percent to cover overhead and profit and reached a value of $11,850,595, representing the total of the payments and award received by Foley.

4 In contrast, during the arbitration one of Kaiser's principal contentions was that Foley had deliberately *underbid* its costs and that, therefore, Kaiser was not responsible for the overruns as performed. Thus, *Kaiser's* expert analyzed the bid and determined that Foley had underbid by more than $1,320,000 or 21 percent. (CR 152: Exhibit 7).

dence dealt with alleged fraudulent documents relating to the Foley estimate. The court concluded that this evidence was "tangential at best" because the arbitrators' award was not based on the original cost estimate, but rather on Foley's total costs plus a percentage for overhead and profit. Thus, evidence as to the estimate or the bid was not material to the award. This decision was affirmed by the Ninth Circuit in an opinion set out in Appendix C to the Petition.

Subsequently, respondents moved for summary judgment on Kaiser's antitrust and related claims on the ground (among others) that, even if the original bids had been rigged as Kaiser alleged, any bidrigging could not have caused injury to Kaiser. Judge William H. Orrick, Jr. (former Assistant Attorney General in charge of the Antitrust Division of the Department of Justice) considered the evidence submitted by respondents and concluded (as had Judge Schwarzer) that the arbitrators' award was based on a cost-plus formula. Since the amount which Kaiser ultimately paid to Foley was calculated on a cost-plus basis, Judge Orrick determined that the original bids were "irrelevant." (Pet. App. B-7). The arbitrators had "determined the actual cost of Foley's work and the fair compensation to which Foley is entitled for that work"; summary judgment was appropriate because in these circumstances "there [could] be no damage to Kaiser." (Pet. App. B-9).

The court of appeals affirmed unanimously. While it noted that the question "of the preclusive effect of an arbitration award in subsequent antitrust litigation" was raised by Kaiser, it did not find it necessary to consider that issue. (Pet. App. A-5). Instead, it based its affirmance on Kaiser's failure to show injury. (Pet. App. A-8). It held that the district court properly concluded that "the arbitrators awarded Foley an amount they considered to be fair without regard to any bidrigging." (*Id.*) Since the amounts which Foley received from Kaiser were not affected in any way by the allegedly inflated bids, there could be no antitrust injury and summary judgment was affirmed.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision below rests on unremarkable principles of antitrust law and the determination, in which two district judges and the three members of the court of appeals panel concurred, that there was no genuine issue of fact. Further review is not warranted.

While Kaiser attempts to paint this case as one involving a conflict between the antitrust laws and arbitration, there is simply no basis in the court of appeals' opinion to support such a reading. Rather, the court explicitly held that it did not need to consider the question of collateral estoppel and potential conflict with arbitration in order to affirm the summary judgment for respondents. Simply put, all five of the lower court judges who have reviewed Kaiser's claims with respect to the arbitration award have concluded, consistently with Kaiser's original position, that the arbitrators' award was unrelated to the original bid or estimate. Rather, the award was calculated by taking Foley's actual costs and adding 15 percent for overhead and profit. Since the amount paid by Kaiser and received by Foley was factually unrelated to the original bid and estimate, Kaiser was unable to show any causal link between the alleged bidrigging and the amount it paid for the electrical construction work. Thus, Kaiser could not establish any actual "impact" from the alleged bidrigging. Summary judgment was appropriately granted.

1. Kaiser does not dispute that an antitrust plaintiff must establish causation of injury. As the court of appeals noted, "[t]o prevail, an antitrust plaintiff must establish a violation of the antitrust laws and an actual injury attributable to something the antitrust laws were designed to prevent." (Pet. App. A-7, citing *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)). As the Second Circuit recently stated, "an essential element in plaintiffs' claim is that the injuries

alleged would not have occurred *but for* [defendant's] antitrust violation." *Argus, Inc.* v. *Eastman Kodak Co.*, Docket No. 85-7549 (2d Cir., September 8, 1986) (slip op. at 5600) (emphasis in original). Thus, Kaiser and respondents agree that Kaiser can only prove antitrust damages to the extent that the price it actually paid exceeded the price it would have paid absent the alleged conspiracy. (Pet. 9). Further, this Court has recognized that a plaintiff must prove "the fact of damage" with specificity. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).[5]

2. Kaiser relies, instead, on two purported areas of error in the lower courts: first, Kaiser contends that because the district court referred to Foley's receiving "fair market value" for its work in support of its grant of summary judgment, the court applied an incorrect theory of antitrust damages; second, Kaiser contends that the district court erroneously granted preclusive or collateral estoppel effect to the arbitration award on the issue of antitrust damages. In fact, the court of appeals made neither of these purported holdings.

a. The court of appeals' decision correctly applied the accepted standard of determining whether antitrust damages have been caused. That court, as well as the district court, simply concluded that the arbitrators' award—the only "price" that Kaiser paid for the work done—was causally unrelated to the original, allegedly rigged, bid. Since that award was based on Foley's audited costs rather than the bid, the alleged conspiracy could have had no impact on that "price." In the words of the legal authority upon which Kaiser relies, absent the alleged conspiracy, Kaiser "would have paid" the same price. Even if the Foley bid had been reduced, the arbitrators

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5 Kaiser errs when it contends that "[t]he idea that a bid-rigging conspiracy can exist without the plaintiff being damaged is plainly counterintuitive" (Pet. 9). For example, in *In re Corrugated Container Antitrust Litigation*, 756 F.2d 411, 414 (5th Cir. 1985), the court affirmed a jury verdict finding of no damages where the jury also "found in plaintiffs' favor that a conspiracy to fix prices existed."

would still have been required to determine what amounts to award Foley on its claims given the vast delay caused by Kaiser's conduct. Since the arbitrators did not, in fact, use the original bid as a reference in their determination (which is not surprising given the fact that the job took three times as many manhours to complete as was reasonably expected), the lower courts concluded that even a lower bid would not have affected the amount awarded by the arbitration panel.[6]

Thus, the court of appeals' decision was based on accepted principles of causation and antitrust injury.[7] The references in the district court's opinion to "fair market value" were clearly meant to refer to the arbitrators' reasoning as being unrelated to the original bid; indeed, the court of appeals' decision recognizes this very point: "Kaiser was not injured because the arbitrators awarded Foley an amount they considered to be fair without regard to any bidrigging." (Pet. App. A-8). No novel question of antitrust damages is presented by the Petition.

b. Nor has Kaiser identified any application of collateral estoppel principles by the court of appeals. Significantly, the court of appeals held that it was *not* considering the preclusive effect of the arbitration award. (Pet. App. A-5). Nowhere does Kaiser explain why this plain statement of the court of appeals is wrong. Instead, Kaiser restates the very arguments it made in the court of appeals and which the court of appeals concluded

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6 Since Kaiser argued throughout the arbitration that Foley had intentionally underbid the job, the arbitrators' award of cost plus 15 percent for overhead and profit rejected even a tangential linkage between the award and the level of profitability in the original contract. Thus, even if a "competitive" bid by Foley would have been below cost, the arbitrators' award would not have been affected. Kaiser's discussion of the bidding process at page 10 of the Petition is simply irrelevant.

7 E.g., *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, ___ U.S. ___, 106 S.Ct. 1348 (1986); *THI-Hawaii, Inc.* v. *First Commerce Financial Corp.*, 627 F.2d 991 (9th Cir. 1980).

it did not have to reach in order to affirm the summary judgment for respondents.

The court of appeals' decision, in fact, rests on the most elementary principles of proximate cause. The court merely concluded that the payments made by Kaiser to Foley were as set out in the arbitrators' award. The court relied on the uncontested fact of the arbitration and the subsequent award. No factual finding made by the arbitrators was given preclusive effect. Rather, the lower courts determined that the arbitrators' award was not based on the original bid or contract, but rather on actual costs and was, therefore, not affected by any alleged overcharge in the original bid. The arbitrators did not find that there was no bidrigging; their award was "an amount they considered to be fair without regard to any bidrigging." (Pet. App. A-8). Thus, Kaiser was not able to show injury from the purported bidrigging.

Kaiser suggests that the lower courts somehow acted improperly in determining the method by which the arbitrators calculated the award. Kaiser fails to recognize, however, that the crucial issue here is whether the amount Kaiser in fact paid to Foley was affected by the alleged bidrigging. Since the amount actually paid was not the amount bid but the amount determined by the arbitrators, the courts below had to decide whether the arbitration award could have been affected by bidrigging. Accordingly, the courts below had no choice but to determine the basis for the award.

With regard to the conclusion that the award was not affected by any alleged bidrigging but, rather, was based on Foley's costs plus 15 percent, there was no genuine issue of fact. It is true, as Kaiser notes, that the arbitration panel did not explicitly state the basis for calculating its award—as is usual in arbitrated matters. Yet, all the evidence in the record points to the conclusion that the award was based on cost plus 15 percent, and Kaiser failed to offer evidence of any alternative basis on which the award could have been made. In fact, as both of the district judges who considered the arbitrators'

award and the court of appeals' panel unanimously found, Kaiser itself had originally contended in opposing confirmation of the award that the arbitrators had used a "cost-plus" basis for rendering the award; indeed a "cost-plus" award was critical to Kaiser's position at that time since Kaiser contended that the audit of Foley's costs was erroneous and, therefore, prejudicial. Both district courts carefully considered all the evidence as to the basis of the arbitrators' calculations and concluded that the only basis for the amount awarded was cost plus 15 percent. The court of appeals unanimously agreed. Certainly, the lower courts' determination that there was no genuine issue of fact as to the basis for the award, based on the totality of the circumstances and the record which included Kaiser's pre-antitrust litigation interpretation of the award, fails to raise any important legal issue.

As this Court stated in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. at 1356 (1986), plaintiff "must show more than a conspiracy in violation of the antitrust laws; [it] must show an injury to [it] resulting from the illegal conduct." Petitioner failed to establish a "genuine issue for trial" and summary judgment was properly ordered for respondents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: October 20, 1986

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